

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS C. ALEXANDER, IN HIS )  
OFFICIAL CAPACITY AS PRESIDENT )  
OF THE SOUTH CAROLINA SENATE, )  
ET AL., )  
Appellants, )  
v. ) No. 22-807  
THE SOUTH CAROLINA STATE )  
CONFERENCE OF THE NAACP, ET AL., )  
Appellees. )  
- - - - -

Pages: 1 through 136  
Place: Washington, D.C.  
Date: October 11, 2023

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5       OF THE SOUTH CAROLINA SENATE,                )  
6       ET AL.,    )  
7                                   Appellants,                )  
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9       THE SOUTH CAROLINA STATE                    )  
10      CONFERENCE OF THE NAACP, ET AL.,            )  
11                                   Appellees.                )  
12      - - - - -

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14                               Washington, D.C.  
15                           Wednesday, October 11, 2023  
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17               The above-entitled matter came on for  
18      oral argument before the Supreme Court of the  
19      United States at 10:04 a.m.  
20  
21  
22  
23  
24  
25

1 APPEARANCES:  
2 JOHN M. GORE, ESQUIRE, Washington, D.C.; on behalf of  
3 the Appellants.  
4 LEAH C. ADEN, ESQUIRE, New York, New York; on behalf  
5 of the Appellees.  
6 CAROLINE A. FLYNN, Assistant to the Solicitor General,  
7 Department of Justice, Washington, D.C.; for the  
8 United States, as amicus curiae, supporting  
9 neither party.  
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	JOHN M. GORE, ESQ.	
4	On behalf of the Appellants	4
5	ORAL ARGUMENT OF:	
6	LEAH C. ADEN, ESQ.	
7	On behalf of the Appellees	56
8	ORAL ARGUMENT OF:	
9	CAROLINE A. FLYNN, ESQ,	
10	For the United States, as amicus	
11	curiae, supporting neither party	100
12	REBUTTAL ARGUMENT OF:	
13	JOHN M. GORE, ESQ.	
14	On behalf of the Appellants	131
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case 22-807, Alexander  
5 versus the South Carolina State Conference of  
6 the NAACP.

7 Mr. Gore.

8 ORAL ARGUMENT OF JOHN M. GORE

9 ON BEHALF OF THE APPELLANTS

10 MR. GORE: Mr. Chief Justice, and may  
11 it please the Court:

12 District 1 is not a racial  
13 gerrymander. Rather, the General Assembly  
14 largely preserved District 1 from the  
15 constitutional benchmark plan and made changes  
16 based on traditional criteria and politics. The  
17 panel acknowledged that the General Assembly  
18 pursued a political goal of increasing District  
19 1's Republican vote share. It achieved that  
20 goal by moving Republicans into the district and  
21 Democrats out of the district. All of the  
22 direct evidence confirms that it used political  
23 data, not racial data, to identify Republicans  
24 and Democrats.

25 The panel declared District 1 a racial

1     gerrymander only by departing from this Court's  
2     precedents and adopting sua sponte an erroneous  
3     racial target theory.

4             First, the panel failed to enforce the  
5     alternative map requirement. In a  
6     circumstantial case like this, only such an  
7     alternative can disentangle race and politics.

8             Second, the panel's racial target  
9     theory hyper-entangled race and politics and  
10    simply makes no sense. The panel believed the  
11    General Assembly needed a racial target in  
12    Charleston County to achieve its political goal  
13    district-wide, but a 17 percent racial target  
14    says nothing about voter turnout, says nothing  
15    whatsoever about the predominant majority of  
16    voters in predominantly white Charleston County,  
17    and also is irreconcilable with District 1's  
18    recent electoral history.

19            Moreover, even the panel agreed that  
20    the General Assembly made political changes in  
21    other parts of District 1 without using a racial  
22    target. The General Assembly had no reason to  
23    and did not use a racial target. It used  
24    political data to pursue its political goals.

25            If left uncorrected, the decision

1 below will undermine this Court's holding that  
2 partisan gerrymandering claims are not  
3 justiciable. Partisan gerrymandering claims can  
4 always be repackaged as racial gerrymandering  
5 claims if all plaintiffs in lower courts have to  
6 do is ignore direct evidence of intent, infer a  
7 racial target from the correlation between race  
8 and politics, and point to malleable expert  
9 analysis.

10 This Court should reverse and not  
11 allow its exacting precedents to be so easily  
12 subverted.

13 I welcome the Court's questions.

14 JUSTICE THOMAS: Mr. Gore, we review  
15 this for clear error. And the district court  
16 credited the plaintiffs' expert and found your  
17 experts non-credible. So how does that meet the  
18 clear error standard?

19 MR. GORE: The Court will proceed to  
20 clear error if it rejects our legal arguments,  
21 but let me turn to Dr. Ragusa first. All three  
22 of Dr. Ragusa's opinions raised in this appeal  
23 contradict his own data and conclusions in his  
24 initial report, which actually demonstrated that  
25 race did not predominate in the enacted plan's

1 changes to District 1.

2 His own data showed that politics was  
3 a stronger predictor than race of whether a VTD  
4 was moved out of District 1. He also concluded  
5 that there was no statistically significant  
6 correlation between race and whether VTDs were  
7 moved into District 1. That's at page 187 of  
8 the Joint Appendix and page 514 of our  
9 jurisdictional appendix. So those facts alone  
10 establish that Dr. Ragusa's three opinions at  
11 issue in this appeal are unreliable and  
12 unprobative.

13 But there's even more. For each of  
14 those three opinions, Dr. Ragusa committed other  
15 errors. He did not control for VTD location or  
16 proximity to the district line. He also did not  
17 control for where in the district voters lived.

18 CHIEF JUSTICE ROBERTS: Well, I  
19 thought -- I thought he said that as far as  
20 geographic contiguity, that the -- the size of  
21 the different districts was an adequate proxy  
22 for that.

23 MR. GORE: He did say that traditional  
24 principles were embedded in his analysis, but  
25 whatever he meant by that, he did also admit on



1 cross-examination that he didn't test or control  
2 for those principles and whether they explained  
3 the decisions the General Assembly actually  
4 made.

5 That's the same error that the experts  
6 made in Allen that this Court set aside just  
7 last term. His failure to consider the location  
8 of VTDs and voters within the district is the  
9 same error that was committed by the expert in  
10 Cromartie II, where this Court reversed a  
11 finding of racial gerrymandering under the clear  
12 error standard.

13 JUSTICE KAGAN: Did your expert  
14 present an alternative study which did control  
15 for geography and reached a different result?

16 MR. GORE: He did not try to mirror  
17 Dr. Ragusa's study --

18 JUSTICE KAGAN: Because that would  
19 have been the easiest way to undermine the  
20 theory. I mean, as I understand it, this was  
21 hardly touched upon by -- by -- by -- by the  
22 state below. And, certainly, the state did not  
23 do what would seem to be the -- the normal thing  
24 if you were really concerned about this, which  
25 is to say: Look at our study, we controlled for

1 geography. The results are entirely different.

2 MR. GORE: We did raise objections to  
3 Dr. Ragusa's methodology, and as I was  
4 explaining, it is a flawed methodology and not  
5 reliable.

6 Moreover, the state presented direct  
7 testimony from the map drawer to explain which  
8 VTDs were chosen and why. That direct evidence  
9 showed, like all the other direct evidence, that  
10 decisions were made based on politics and  
11 traditional principles and not using race at  
12 all.

13 JUSTICE SOTOMAYOR: I think you end up  
14 in a very poor starting point under clear error,  
15 arguing the substance of believability of one  
16 expert over another, because credibility  
17 findings under clear error standard must be  
18 deferred to to the district court.

19 I understand your points about -- your  
20 point about Dr. Ragusa, but I just point out  
21 that other experts before the court and he  
22 himself said that geography was very much  
23 embedded as part of the structure of his  
24 analysis.

25 You may disagree with that. It's

1 going to be very hard for you to show that no  
2 fact finder could credit that understanding of  
3 his testimony.

4 But I think what I'm really troubled  
5 by is, going back to Justice Thomas's question,  
6 what's the legal error and what's the clear  
7 error? Just tick them off for me.

8 MR. GORE: There are several legal  
9 errors, Justice Sotomayor.

10 JUSTICE SOTOMAYOR: Not facts. I want  
11 legal errors or clear errors beyond -- under our  
12 standard.

13 MR. GORE: The first legal error is a  
14 failure to enforce the alternative map  
15 requirement.

16 JUSTICE KAGAN: Okay. I'm going to  
17 butt in. I'm sorry, Justice Sotomayor.

18 JUSTICE SOTOMAYOR: Yes, you can --  
19 you can start there.

20 JUSTICE KAGAN: The alternative map  
21 requirement, I mean, doesn't exist. You know,  
22 sometimes this Court, I think, holds things, and  
23 then I go back to the opinion and I think:  
24 Well, maybe we weren't as clear as we might have  
25 been. Not here.

1           I'm just going to read from -- from  
2       Cooper: A plaintiff's task is simply to  
3       persuade the trial court, without any special  
4       evidentiary prerequisite, that race, not  
5       politics, was the predominant consideration. In  
6       no area of our equal protection law have we  
7       forced plaintiffs to submit one particular form  
8       of proof to prevail, nor would it make sense to  
9       do so here. An alternative map is merely an  
10      evidentiary tool. Neither its presence nor its  
11      absence can itself resolve a racial  
12      gerrymandering claim.

13           I don't know how to more clearly say  
14      that there is no alternative map requirement in  
15      these kinds of cases.

16           MR. GORE: Cooper was directed -- was  
17      addressing a case where there was direct  
18      evidence of racial predominance. It also said  
19      on page 322 in the majority opinion: In a case  
20      like *Cromartie II* -- that is, one in which the  
21      plaintiffs had meager direct evidence of a  
22      racial gerrymander and needed to rely on  
23      evidence of forgone alternatives -- only maps of  
24      that kind could carry the day.

25           JUSTICE KAGAN: All we were saying

1     there, Mr. Gore, is that in a case with no other  
2     evidence, you needed some evidence. So that is  
3     not this case. Cromartie II was making a very  
4     case-specific point, look at this case, there's  
5     none -- none of this kind of evidence, there's  
6     none of that kind of evidence, there's none of  
7     the other kind of evidence. So, my gosh, in  
8     that case, you needed a map.

9             But this is case by case, all we were  
10    saying is that when you have no other evidence,  
11    you better present a map. But that's not to say  
12    that there's anything like an alternative map  
13    requirement. If you make your case some other  
14    way, that's good enough.

15            And, here, the Court found, again, on  
16    a clear error standard, that the plaintiffs made  
17    their case some other way.

18            MR. GORE: But even if that's the  
19    correct reading of Cooper, Justice Kagan, there  
20    were still other legal errors in how the panel  
21    conducted its analysis.

22            JUSTICE ALITO: Well, Mr. Gore, I  
23    thought your argument was that at least as a  
24    practical matter, in a case in which there is no  
25    direct evidence or virtually no direct evidence,

1     there is no way in which a plaintiff can  
2     disentangle race and politics, except by  
3     providing an alternative map. I thought that  
4     was your legal argument.

5             MR. GORE: That is.

6             JUSTICE KAGAN: And that's exactly  
7     what Cooper says is not the case.

8             JUSTICE ALITO: Well, one may read  
9     Cooper a different way. Cooper was a case in  
10    which there was a lot of direct evidence, was  
11    there not?

12            MR. GORE: Yes.

13            JUSTICE JACKSON: Well, let me ask  
14    you, how could there be direct evidence really  
15    in this kind of case? So this is what I'm a  
16    little concerned about because, to the extent  
17    that this distinction's turning on whether or  
18    not there is direct evidence, I wonder if it is  
19    reasonable to require such evidence or -- or say  
20    that such evidence would exist in a situation  
21    that is not a majority/majority -- a  
22    majority/minority district scenario.

23            You can see how there would be direct  
24    evidence when the state's goal is to try to, in  
25    its view, comply with the VRA, they're trying to

1 make a majority/minority district, so we're  
2 going to have some evidence of people saying  
3 that.

4 But, in a situation like this, where  
5 that is not the case, where the state is saying  
6 instead, we are trying to, you know, achieve a  
7 partisan tilt, I guess I don't understand --  
8 and, excuse me, we've also said that its, you  
9 know, intent to use race is a very hard thing to  
10 prove just on its own.

11 Are you asking that we have the  
12 smoking gun in a situation like this?

13 MR. GORE: Not at all, Justice  
14 Jackson. As you pointed out, of course, in  
15 majority/minority district contexts, there's  
16 often direct evidence of a use of race and even  
17 of race predominating.

18 You could also have that in another  
19 context if the map drawer or some key legislator  
20 admitted to using race as a proxy for politics  
21 because they didn't have adequate election data  
22 or --

23 JUSTICE JACKSON: But are you  
24 requiring that? Could we ever -- could we ever  
25 make this showing on circumstantial evidence

1 alone? There were some amicus briefs related to  
2 computer drawings and that sort of thing that  
3 they thought would be particularly helpful in  
4 this context.

5 MR. GORE: The -- the alternative map  
6 itself would perform that requirement because,  
7 if race predominated over politics, then any  
8 alternative map can be drawn that preserves the  
9 political outcome the General Assembly was  
10 seeking while removing the alleged racial  
11 effect.

12 JUSTICE SOTOMAYOR: Putting that  
13 aside, there were alternative maps here that  
14 showed that if race wasn't used, the map would  
15 not look like this. So it didn't show what  
16 you're saying. But we go back, let's assume,  
17 let's move back past the map because I think  
18 Cooper was petulantly clear that you don't need  
19 a smoking gun, and if you don't need a smoking  
20 gun, you don't need direct evidence.

21 What are the other legal errors?

22 MR. GORE: Another legal error was the  
23 panel's misconstruction of the Shelby County  
24 decision. It also failed to disentangle race  
25 and politics, as this Court has directed it to



1 do.

2 It ignored volumes of direct evidence  
3 on the politics versus race question. It didn't  
4 even discuss that in its opinion.

5 JUSTICE SOTOMAYOR: It didn't -- it --  
6 it -- it rejected -- the person who drew it was  
7 Mr. Roberts? Mr. -- and it disclaimed his  
8 credibility. So whatever the legislature said  
9 in terms of their intent is irrelevant. It's  
10 what he did, and the Court did not believe that  
11 he didn't use race. It said so.

12 MR. GORE: The Court did not accept  
13 his version of events but didn't make a  
14 credibility finding based on his demeanor or  
15 testimony at trial. It simply credited other  
16 evidence.

17 But, in conducting the sensitive  
18 inquiry that Cooper requires, the Court was  
19 required to look at all the evidence, direct and  
20 circumstantial, of intent, and it simply didn't  
21 do that here. Senator Campsen testified --

22 JUSTICE KAGAN: That's the legal  
23 error, is that they didn't correctly weigh the  
24 evidence?

25 MR. GORE: They didn't correctly

1       conduct the inquiry.

2               JUSTICE KAGAN: Because that sounds  
3       like a factual error to me. I mean, your brief  
4       basically, you know, says we have legal errors,  
5       and then it says, well, the evidence didn't  
6       show.

7               Those are factual errors. That's  
8       subject to the clear error standard, going back  
9       to Justice Thomas's question.

10              MR. GORE: To the extent we've also  
11       made a clear error argument, I agree, but we've  
12       pointed out that the district court failed to  
13       properly apply the standards the district court  
14       required in Cooper.

15              Cooper could not have been clearer on  
16       that point that the district court is required  
17       to weigh all the direct and circumstantial  
18       evidence of intent to ensure that plaintiffs  
19       have disentangled race and politics.

20              They also were required to presume the  
21       good faith of the General Assembly and its  
22       explanation for what it did in the lines that it  
23       drew. But the panel failed to do both of those  
24       things. There was mountains of direct and  
25       circumstantial --

1 JUSTICE KAGAN: And that just sounds  
2 to me as though you have a different view of the  
3 evidence, that you think, well, the evidence  
4 showed that we were just doing politics. And  
5 the Court said no, the evidence showed that you  
6 were doing race as a proxy for politics.

7 And, surely, there were good reasons  
8 to do race as a proxy for politics here. I  
9 mean, if you look at what information the map  
10 drawers had on their computer, the information  
11 the map drawers had on their computer was a  
12 single presidential election year voting data  
13 and then lots of race data.

14 And everybody can tell you that if you  
15 really want to draw a stable partisan  
16 gerrymander, you do not rely on a single  
17 presidential year election data. I mean, they  
18 had not only the opportunity, it was sitting  
19 there on their computers, but the clear  
20 incentive to be looking at this race data, which  
21 is certainly more predictive of future voting  
22 behavior than a single presidential year  
23 election in which President Trump was the  
24 candidate, which further distorts voting  
25 behavior.

1           MR. GORE: We -- we totally disagree  
2     with that reading of the record. The panel  
3     itself did not call into question the  
4     reliability of the General Assembly's election  
5     data. It, in fact, used that election -- very  
6     election data to support its racial target  
7     theory.

8           So, if that election data is  
9     unreliable, the panel's entire line of reasoning  
10    is unreliable. All of the unrebutted direct  
11    evidence established that the map-drawing team  
12    thought that that evidence was reliable and  
13    actually used it to draw lines.

14           Now, on the question of whether racial  
15    data --

16           JUSTICE KAGAN: There was evidence  
17    that they looked at it. There was evidence that  
18    it went into their analysis, but, I mean -- I  
19    mean, look at it -- there was -- what the --  
20    what the panel said was that there was also  
21    plenty of evidence that they looked at the  
22    voting record and not just as a legal check on  
23    the back end. Nobody needs to have the voting  
24    records on your computer as you draw the maps in  
25    order to make a legal check.

1           What they were basically doing was to  
2   make sure that the population of Blacks in each  
3   precinct, in each district, you know, did not  
4   rise above the -- the -- the number which would  
5   make the Republican gerrymander less stable.

6           MR. GORE: That -- that's not what the  
7   evidence was at trial. The evidence was that  
8   the racial data is embedded in the software but  
9   that the map drawer would have to scroll over to  
10   a different screen or down to the bottom in  
11   order to be able to see it.

12           I'd also --

13           JUSTICE ALITO: Mr. Gore, is there --  
14   is there anything suspicious about the fact that  
15   a map drawer knows the racial demographics of  
16   the state or has available the racial  
17   demographics of the state? Haven't we spoken  
18   about that?

19           MR. GORE: Yes, many times. This  
20   Court has said that mere awareness or  
21   consideration of race doesn't prove racial  
22   predominance. And that would be particularly  
23   true in a state like South Carolina --

24           JUSTICE KAGAN: Your defense --

25           MR. GORE: -- which has Voting

1 Rights Act issues.

2 JUSTICE KAGAN: -- was not something  
3 along the lines of we looked at the racial data,  
4 but it still -- we -- it -- it -- it didn't rise  
5 to the level of predominance. Actually, your  
6 defense was we didn't look to the racial data  
7 for this purpose. And what the court --

8 MR. GORE: That's correct.

9 JUSTICE KAGAN: -- said was, I don't  
10 believe that, made a credibility judgment. You  
11 know, basically said your -- your mapmaker gets  
12 up on the stand and knows this racial data like  
13 the back of his hand, and the court says, I just  
14 don't believe that they were not looking at the  
15 racial data that was right there in front of  
16 them for the purpose of making their gerrymander  
17 more secure.

18 MR. GORE: And that underscores the  
19 district court's error in failing to look at all  
20 the evidence. It's true the map drawer knew the  
21 racial composition of one precinct, one VTD. He  
22 didn't know the racial composition of other VTDs  
23 the district court asked him about, but he did  
24 know the political composition of those VTDs and  
25 testified to that at trial.

1                   Moreover, racial data is not a good  
2     predictor of partisan outcomes because racial  
3     data doesn't measure turnout or voting behavior  
4     --

5                   JUSTICE KAGAN:   You know --

6                   MR. GORE:   -- correlations.

7                   JUSTICE KAGAN:   -- to the contrary.  A  
8     presidential election is what doesn't measure  
9     turnout in a non-presidential year correctly.  I  
10    mean, I'll just ask you this.  There are two  
11    maps, let's -- let's say you have before you,  
12    that -- that -- where the election data says  
13    these districts favored President Trump.  One  
14    has a 20 percent BVAP, and the other has a  
15    17 percent BVAP.

16                   Now doesn't any mapmaker look and say,  
17    you know, I would rather have the 17 percent  
18    BVAP in order to make sure that going forward  
19    this continues to be a Republican district?

20                   MR. GORE:   I don't believe that's true  
21    at all, Justice Kagan.  I think they'd look at  
22    how much the areas favored President Trump by.  
23    And in this particular hypothetical, if we use  
24    Beaufort -- Berkeley County --

25                   JUSTICE KAGAN:   Holding that, you

1 know, constant --

2 MR. GORE: It would depend --

3 JUSTICE KAGAN: -- would you rather  
4 have the 20 percent BVAP or the 17 percent BVAP?

5 MR. GORE: It would depend on other  
6 factors, such as compliance with traditional  
7 districting principles and other objectives the  
8 map drawer was trying to accomplish.

9 JUSTICE KAGAN: See, what this trial  
10 court found on the facts, on the evidence, was  
11 that the mapmakers made a judgment that they  
12 would rather have the 17 percent BVAP because  
13 that -- you know, along with the election data,  
14 they might -- they were -- they -- they looked  
15 at this one year of the election data, but that  
16 the 17 percent BVAP was what was, hey, if we go  
17 above that, we're not sure we can hold this when  
18 another election comes.

19 MR. GORE: The record did not support  
20 that finding --

21 JUSTICE JACKSON: Well, let me ask  
22 you, what's the --

23 MR. GORE: -- and it was infected by  
24 legal error.

25 JUSTICE JACKSON: How do you explain



1 the consistency? I mean, my understanding is  
2 that thousands of people were moved in and out  
3 of this district, and yet that line, the line  
4 concerning the amount of, you know, Black  
5 voter -- adult voter participation remained the  
6 same.

7 So, if that was not -- if -- if what  
8 the court found here was not happening, how do  
9 you explain the consistency of that line?

10 MR. GORE: We have a few explanations  
11 for that, Justice Jackson.

12 So the first, to address Justice  
13 Kagan's hypothetical, is that the BVAP in draft  
14 plans -- through the drafting process actually  
15 changed. In the Milk Plan, it was  
16 15.48 percent. In the Staff Plan, it was  
17 16 percent. The enacted plan is 16.72 percent.  
18 The Staff Plan actually has a higher Republican  
19 vote share than the Milk Plan. So it did change  
20 --

21 JUSTICE JACKSON: Was it ever higher  
22 than --

23 MR. GORE: -- over time.

24 JUSTICE JACKSON: -- was it ever  
25 higher than the 17? People were being moved

1 around, and you would assume --

2 MR. GORE: They were.

3 JUSTICE JACKSON: -- that if it was --  
4 if it was varying, it would do so in both  
5 directions.

6 MR. GORE: People were being moved  
7 around but not very many people. Remember that  
8 District 1 retained 93 percent, almost  
9 93 percent, of the district core, which explains  
10 why the demographic --

11 JUSTICE JACKSON: But 80 percent of  
12 the Black people were moved out. Am I wrong  
13 about that?

14 MR. GORE: That -- that's not true  
15 district-wide.

16 JUSTICE JACKSON: That's not right?

17 MR. GORE: That's not right  
18 district-wide.

19 JUSTICE SOTOMAYOR: I'm sorry. You  
20 said 93 percent? I thought it was 82.8 percent.

21 MR. GORE: It's -- it depends on the  
22 method you use to measure, but the method that  
23 was actually used by the General Assembly was  
24 over 92 percent district-wide.

25 JUSTICE SOTOMAYOR: Well, that's not

1     what the district court found. I thought it was  
2     82.8, which was the lowest core retention of any  
3     other district.

4             MR. GORE: But it was the highest --

5             JUSTICE SOTOMAYOR: And so how do you  
6     account for the fact that 68.9 percent of whites  
7     go to CD1, but only 50.65 percent of Blacks do  
8     that are Democrats? So you're controlling for  
9     partisanship, and the numbers are that  
10    disparate.

11            MR. GORE: Because, again, you have to  
12    consider where in the district those voters  
13    happen to live and where the lines are drawn.

14            JUSTICE SOTOMAYOR: So it's okay --

15            MR. GORE: It was --

16            JUSTICE SOTOMAYOR: -- for the  
17    legislature to say, I was looking at  
18    partisanship, but I'm not looking at whether  
19    someone was white or Black, but I'm going to  
20    separate CD1 so that it's a hundred miles apart  
21    in one county and the only commonality is that  
22    they live along I-26 a hundred miles apart? And  
23    I'm going to join those two Black sections or  
24    get rid of them and keep whites there, even  
25    though they've got -- they're -- they're -- even

1     though the Democrats could have been moved?

2                 MR. GORE:  So this Court has been  
3     clear that mere racial effects do not prove  
4     racial predominance.

5                 Moreover, the district court's  
6     analysis --

7                 JUSTICE SOTOMAYOR:  No, but the  
8     numbers are -- the numbers are incredible.

9                 JUSTICE JACKSON:  We're trying --  
10    we're looking at intent here.  So don't those  
11    effects say something about the intent and  
12    whether or not the court -- it was plausible --  
13    I thought, you know, clear error standard was  
14    plausible -- was plausible for the district  
15    court to believe or disbelieve the "we're not  
16    looking at race" statement made by the person  
17    who was putting this together?

18                MR. GORE:  But the racial effects in  
19    this plan are far less stark than the racial  
20    effects in the Cromartie and Cromartie II plan,  
21    where this Court reversed a finding of racial  
22    gerrymandering.  So, for example, in Cromartie  
23    II, the line split a county and created a  
24    72 percent BVAP area in one county and a  
25    10 percent BVAP area in the other district.

1 JUSTICE GORSUCH: Counsel --

2 MR. GORE: And, here --

3 JUSTICE GORSUCH: -- counsel, I'm  
4 sorry to interrupt, but we've been kind of  
5 dancing around the -- the big question, which I  
6 think is, to my mind, the district court's  
7 finding that -- that your -- your clients had to  
8 have looked at race data rather than politics  
9 data because the politics data wasn't robust  
10 enough.

11 Now you've given part of an answer.  
12 I'd just like the full answer as to why you  
13 think that is clearly erroneous. Tick it off  
14 for me.

15 MR. GORE: Sure. So, as I said, the  
16 panel itself relied on that data. The direct  
17 evidence is that everyone relied on that data.  
18 Racial data does not predict election outcomes  
19 particularly effectively. The correlation  
20 between race and politics only affects election  
21 outcomes to the extent people turn out and vote.  
22 But racial data doesn't measure that; only  
23 election data measures that.

24 Their own expert, Dr. Duchin, agreed  
25 with that. Dr. Duchin said that racial data

1     could not be used to predict election outcomes  
2     because you have to know about turnout, you have  
3     to know about crossover voting, and other  
4     factors.

5             Their own brief at page 10 concedes  
6     that racial data would not predict voting  
7     behavior turnout among white voters in the area  
8     covered by District 1. The reason for that is  
9     that white voters in that area split between  
10    Trump and Biden in 2020, and that district and  
11    even Charleston County are predominantly white.  
12    So using a racial target in that area wouldn't  
13    have told you about what the vast majority of  
14    voters were going to do.

15            So it's not an effective way to  
16    predict election outcomes there. The reason  
17    they used the 2020 presidential election data is  
18    that the absentee votes had been properly  
19    allocated back to precincts --

20            JUSTICE GORSUCH: Well, there's some  
21    expert that said -- and I'm sorry to interrupt  
22    -- but there's some expert that said the  
23    absentee -- a consultant said, I believe it was,  
24    that the absentee ballots in the presidential  
25    data weren't properly allocated. What's the

1 response to that?

2 MR. GORE: That that's completely  
3 incorrect. They're citing testimony from Mr.  
4 Oldham, who was involved in drawing the Senate  
5 plan, not the congressional plan. He said that,  
6 hypothetically, election data would be flawed if  
7 it didn't do that, but he didn't know one way or  
8 the other whether the General Assembly's  
9 election data did do that.

10 And, in fact, the testimony,  
11 unrebutted at trial, on the data itself shows  
12 that the absent -- that the election data the  
13 General Assembly used did properly allocate both  
14 the absentee ballots back to the precincts and  
15 other votes down to the census block level. So  
16 it was reliable data. It was the best data  
17 available because of the absentee ballot issue  
18 from prior year data.

19 Moreover, even though 2020 is a  
20 presidential election year, it's also a  
21 congressional election year, and it was the most  
22 recent congressional election that was available  
23 to the map drawer. It's not uncommon for map  
24 drawers to use one year's worth of election data  
25 and to have it be the most recent year.

1 JUSTICE KAGAN: If I could just, you  
2 know, summarize what you just said, you think  
3 it's clear error on the court's part that it did  
4 not accept the view -- clear error that it did  
5 not accept the view that racial data would have  
6 helped the mapmakers draw a more secure  
7 Republican gerrymander?

8 MR. GORE: Yes, that is clear error on  
9 this record for the reasons I've just explained.  
10 Moreover, it demonstrates the panel's legal  
11 error in failing to apply the correct standard  
12 --

13 JUSTICE KAGAN: Thank you.

14 MR. GORE: -- which included its  
15 failure to conduct a --

16 JUSTICE KAGAN: Thank you.

17 MR. GORE: -- predominance analysis.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 Mr. Gore. If I could move to a 30,000-foot  
20 perspective, how do you understand what we're  
21 supposed to do in evaluating clear error? I  
22 mean, we have just, you know, appendices in this  
23 case that is like that, and let's say there are  
24 a hundred different factual determinations.

25 If we think 15 of them are wrong, do



1 we reverse for clear error in that -- in that  
2 situation?

3 MR. GORE: Well, we --

4 CHIEF JUSTICE ROBERTS: Or -- or does  
5 it take more? We don't normally review -- other  
6 than in these cases, we don't normally review a  
7 record for factual findings, and I'm just  
8 wondering how you think we should do that.

9 MR. GORE: Even one clear error can be  
10 sufficient if it leaves the Court with a  
11 definite and firm conviction that an error was  
12 made below. And, here, we've pointed to many  
13 errors in the district court's analysis, both  
14 legal and factual, that establish the standard  
15 has been met.

16 This Court did exactly this in  
17 *Cromartie II*. In *Cromartie II*, the Court  
18 reviewed the record and determined that clear  
19 error had been committed and therefore reversed  
20 a finding of a three-judge panel of racial  
21 predominance.

22 CHIEF JUSTICE ROBERTS: So we just  
23 give different degrees of the importance of  
24 particular facts and weigh those --

25 MR. GORE: We --

1 CHIEF JUSTICE ROBERTS: -- in  
2 reviewing the entire record?

3 MR. GORE: Yes, and we've -- we've  
4 tried in our brief to show what we think are the  
5 most important factual errors made by the  
6 district court. There's no direct evidence of  
7 any racial target. In fact, all the direct  
8 evidence points the other way. And the panel  
9 didn't even mention any of that.

10 There's also their own alternative  
11 plans. Even if there's no alternative map  
12 requirement in this particular case, their own  
13 alternative maps fail to disentangle race and  
14 politics because they all turn District 1 into a  
15 majority Democratic district. That's actually  
16 evidence that supports our case because it shows  
17 that -- that race and politics can't be  
18 disentangled and that they failed to carry their  
19 burden.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Justice Thomas?

23 Justice Alito?

24 JUSTICE ALITO: Well, the clear error  
25 standard, if that's the standard that we are

1 required to apply, is a very demanding standard,  
2 but it is not an impossible standard, and it  
3 doesn't mean that we simply rubber-stamp  
4 findings by a district court, particularly in a  
5 case like this, where we are the only court that  
6 is going to be reviewing those findings.

7 And particularly in a case in which  
8 the -- the basis for a judgment in favor of the  
9 prevailing party relies very heavily, if not  
10 entirely, on expert reports, the methodology of  
11 which can be examined. So, in light of that, I  
12 want to ask you about a -- an alleged flaw in  
13 Dr. Ragusa's analysis that you mention on page  
14 21 of your reply brief.

15 And Dr. Ragusa's expert report may  
16 turn out to be crucial in this case because is  
17 it not correct that all of the other experts  
18 failed to control for partisanship?

19 MR. GORE: That is -- that is correct.

20 JUSTICE ALITO: All right. So you say  
21 on page 31 that Dr. Ragusa's analysis is flawed  
22 because it "used total numbers instead of  
23 percentages for VTD racial and political  
24 compositions."

25 That's what I understand you're

1     saying, is that in determining whether a VTD was  
2     moved out or moved in for a political reason, as  
3     opposed to -- for a racial reason, as opposed to  
4     a political reason, Dr. Ragusa looked only to  
5     the number of votes cast for President Biden in  
6     those districts.

7                 Is that -- is that the problem, rather  
8     than the net Biden vote over the Trump vote?

9                 MR. GORE: That -- that's one of the  
10    problems, yes.

11                JUSTICE ALITO: Could you just explain  
12    that problem?

13                MR. GORE: Yes. It was clear at trial  
14    -- and the panel even relied upon this in its  
15    discussion of Mr. Roberts' testimony -- that the  
16    total number is not as relevant as the  
17    percentage in determining the effect of moving a  
18    VTD because VTDs are of different sizes. And  
19    so, when you move a total number, it doesn't  
20    tell you as much as the percent composition  
21    either racially or politically in terms of how  
22    that affects the total composition of a  
23    district.

24                The other problem that we pointed out  
25    in our brief with that particular analysis is it

1 contradicts Dr. Ragusa's own data from his  
2 initial report. His own data in the initial  
3 report showed that politics was a stronger  
4 predictor than race as to whether VTDs were  
5 moved out, and he also concluded that there was  
6 no statistically significant correlation to race  
7 in terms of VTDs being moved into District 1.

8 So he arrived at this contrary  
9 conclusion only by jerry-rigging his analysis.  
10 He didn't consider traditional districting  
11 principles, he didn't consider VTD or voter  
12 location, he committed this error about  
13 percentages, and he also didn't consider VT --  
14 he lumped these VTDs together in very broad  
15 categories, and so they were dissimilar -- it  
16 was a dissimilar apples-to-oranges comparison.

17 JUSTICE ALITO: Okay. Can I ask you  
18 one more question, and that concerns Mr. Roberts  
19 and his job and his background.

20 Am I correct that he is -- he is  
21 employed by the legislature?

22 MR. GORE: That's correct.

23 JUSTICE ALITO: And has been employed  
24 by the legislature for some period of time?

25 MR. GORE: That's correct.

1 JUSTICE ALITO: And he draws maps for  
2 both Republicans and Democrats?

3 MR. GORE: Yes, he did.

4 JUSTICE ALITO: Thank you.

5 MR. GORE: And let me correct one  
6 thing that I said. I believe Dr. Liu also  
7 claimed to be controlling for partisanship. But  
8 Dr. Liu used a flawed VTD data set in his  
9 analysis, so his analysis of the enacted plan's  
10 VTD moves is also flawed.

11 The -- the Joint Appendix at 142 to  
12 144 illustrates the magnitude of that flaw. He  
13 thought there were -- his data set told him  
14 there were 91 split VTDs in the enacted plan.  
15 That's seven times more than there actually  
16 were, which is 13.

17 JUSTICE ALITO: All right. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Sotomayor?

20 JUSTICE SOTOMAYOR: You know, on each  
21 expert, you take potshots and say they failed to  
22 do this, they failed to do that. But we've  
23 never required one perfect expert to testify to  
24 all aspects of a case, but I worry that your  
25 methodology is going to suggest that what we do

1       now is do exactly that.

2                   And instead of looking at the gestalt,  
3       which is what the district court did, not the  
4       gestalt, but the whole picture, so you discount  
5       all four of the plaintiffs' experts.

6       Dr. Ragusa, but there were three others. Two of  
7       the experts accounted for partisanship but not  
8       geography, and two others accounted for  
9       geography but not partisanship. There's no rule  
10      that requires one expert to do all of it.

11                  And even with Dr. Ragusa, his purpose  
12      for his choices were not your purposes. His  
13      purposes for his choices were to show that VTDs  
14      with a particular percentage of Blacks were  
15      going to be selected over white districts, and  
16      that proof he made.

17                  So I'm wondering, where would the  
18      clear error standard come in for us to be doing  
19      what Justice Alito did in picking one factor and  
20      saying this is a critical flaw that can't be  
21      made up by the circumstantial evidence around it  
22      from all other three experts?

23                  MR. GORE: Two responses on that.  
24      Actually, three maybe, Justice Sotomayor.

25                  The first is that this is supposed to

1 be a demanding burden for plaintiffs, and so  
2 this kind of analysis of the evidence they  
3 actually put forward is exactly what this Court  
4 did in Cromartie II when it recognized that the  
5 clear error standard is informed by the  
6 demanding burden of proof that the plaintiffs  
7 bore below.

8 And in Cromartie II, the Court  
9 rejected an --

10 JUSTICE SOTOMAYOR: But that doesn't  
11 change the clear -- clear error standard. That  
12 doesn't make it harsher.

13 MR. GORE: Under -- under any proper  
14 formulation of the clear error standard,  
15 however, the Court has to ensure that what the  
16 district court relied on was actually reliable  
17 evidence. And this Court's already did that in  
18 Cromartie II when it rejected an expert analysis  
19 --

20 JUSTICE SOTOMAYOR: So, if I come away  
21 from this looking at all four experts and  
22 looking at other cases where we accepted that  
23 expert testimony even with the pointed-out  
24 flaws, does that defeat your argument?

25 MR. GORE: No, I don't think it does



1     because what I think you'll find is that in  
2     Allen, the Court rejected the analysis of two of  
3     the four experts that they put forward in this  
4     case. That's Dr. Duchin and Dr. Imai.

5                 JUSTICE SOTOMAYOR: But it didn't in  
6     others?

7                 MR. GORE: Don't know that those  
8     particular experts came before the Court, but  
9     they made exactly the same error -- committed  
10    the exact same errors in this case that they  
11    committed in Allen that led this Court to set  
12    aside their analyses, in particular and -- and  
13    even more so here because they failed to  
14    consider politics in their simulation and  
15    ensemble analyses, so they say nothing on the  
16    disentanglement question.

17                CHIEF JUSTICE ROBERTS: Justice Kagan?

18                JUSTICE KAGAN: And just to continue  
19    in Justice Sotomayor's line of questioning, you  
20    have two experts here, Ragusa and Liu, who  
21    answer the exact question that is supposed to be  
22    answered in such a case. In other words, is  
23    this gerrymander based on politics, or is it a  
24    way to get to an ultimate goal, an ultimate  
25    political goal, but the gerrymandering is based

1 on race?

2 And what the two of them do is that  
3 they show that Black Democrats are excluded from  
4 District 1 at a far greater percentage than  
5 white Democrats are.

6 So, you know, Liu says, what is it,  
7 61 percent -- now I'm going to lose it --  
8 69 percent of white Democrats were -- were --  
9 remained in the district, whereas only  
10 51 percent of Black Democrats did. Ragusa's  
11 analysis, similarly clear, a little bit harder  
12 to state in one sentence.

13 But -- but both experts essentially  
14 said: Look, we've done these regressions, and  
15 we can show you that Black Democrats and white  
16 Democrats are not being treated the same way,  
17 that Black Democrats are being excluded for the  
18 district at a far greater proportion.

19 So, you know, every regression  
20 analysis has things that you can poke holes in,  
21 but you didn't give anything in response to  
22 that. It's not like you said: We have a better  
23 regression analysis. We controlled for more  
24 things and we can show you that the -- that the  
25 effect disappears.

1           You're saying that it was clear error  
2     to credit the plaintiffs' experts dealing with  
3     the exact question under review and finding  
4     statistically significant results to credit  
5     those experts over your nothing.

6           MR. GORE: Over our direct evidence,  
7     which the panel didn't even mention. Those  
8     experts had flawed methodology. I already  
9     talked about Dr. Liu's VTD data set. The panel  
10    didn't even cite to Dr. Liu in its opinion  
11    because the glaring error and glaring flaw in  
12    his VTD set became so clear on  
13    cross-examination. So Dr. Liu's completely out  
14    of the case because his VTD data set was  
15    worthless. And the district court knew that and  
16    didn't even cite to Dr. Liu in the opinion.

17           Dr. Ragusa's regression analysis at  
18    one point also used an inapt political number  
19    because he used an average Democratic vote  
20    number rather than the actual number, and he  
21    compared that to the actual African American  
22    number. That's at pages 506 and 509 of the  
23    Joint Appendix.

24           So, yes, it was clear error to rely on  
25    clearly erroneous and unreliable expert

1 testimony and to use that to overrida a mountain  
2 of direct evidence, both looking at Charleston  
3 County and district-wide, that established that  
4 the plan achieved the General Assembly's  
5 political goal uniquely among all the plans  
6 presented at trial and that it complied with  
7 traditional districting principles both in  
8 Charleston County and in District 1  
9 district-wide, again, uniquely among all the  
10 alternatives presented at trial.

11 That -- that's the -- if that's not  
12 the definition of clear error, then I don't know  
13 what is. And if that's not the definition of  
14 departing from the presumption of good faith and  
15 the requirement of extraordinary caution, then  
16 plaintiffs no longer face a demanding burden in  
17 these cases.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Gorsuch?

20 Justice Kavanaugh?

21 JUSTICE KAVANAUGH: I want to make  
22 sure you have a chance to summarize the evidence  
23 as you see it of why Charleston County was split  
24 the way it was split.

25 MR. GORE: Thank -- thank you, Justice

1     Kavanaugh.

2                 So, first of all, it was done for  
3     political reasons because, of course, it was  
4     part and parcel of achieving the district -- the  
5     goal, the political goal district-wide. The big  
6     -- the most significant move that the enacted  
7     plan made was in Charleston County. It moved  
8     the West Ashley neighborhood from District 1 to  
9     District 6.

10                That was over 80,000 of the 140,000  
11     people that were moved from District 1 to  
12     District 6. West Ashley is a close-in suburb of  
13     Charleston. It is majority Democratic but also  
14     predominantly white. We've given the figures in  
15     our brief that show that that move in particular  
16     had a much greater impact on the political  
17     composition of District 1 than its racial  
18     composition. So that move, which is over half  
19     of the people involved, is itself more easily  
20     explained by politics than by race.

21                The line in Charleston County actually  
22     improved compliance with traditional districting  
23     principles compared to the benchmark plan. The  
24     benchmark plan had five split VTDs in Charleston  
25     County. The enacted plan fixed all of those.

1 The enacted plan also followed natural  
2 geographic boundaries in Charleston County, such  
3 as rivers, which are very significant methods of  
4 transportation and commerce in a -- in a county  
5 like Charleston that's coastal.

6 It also achieved Senator Campsen's  
7 policy goal, which was to keep two  
8 representatives in Charleston County to  
9 represent the county's interests here in  
10 Washington, D.C.

11 JUSTICE KAVANAUGH: Why don't you  
12 explain that a little more.

13 MR. GORE: So Senator Campsen  
14 testified on direct that he loves having Jim  
15 Clyburn represent a portion of Charleston County  
16 because Congressman Clyburn is one of the most  
17 powerful Democrats in the Congress, and what  
18 Senator Campsen explained is that Joe Biden  
19 wouldn't be President if it weren't for  
20 Congressman Clyburn. So, of course, he wants  
21 Congressman Clyburn representing the interests  
22 of his home county of Charleston. But he also  
23 wanted to keep a Republican representative there  
24 too in case there's a change in administration  
25 here in Washington.

1                   Congressman Clyburn's own draft map  
2       kept a split in Charleston County because he  
3       wanted to keep a portion of Charleston County in  
4       his district as well.

5                   JUSTICE KAVANAUGH:   What was the Black  
6       voting population in District 1 in that map?

7                   MR. GORE:   It was only 15.48 percent,  
8       which is lower than where it ended up under the  
9       enacted plan by more than a point.

10                  CHIEF JUSTICE ROBERTS:   Justice  
11       Barrett?

12                  JUSTICE BARRETT:   I have a question  
13       about Dr. Ragusa's expert report.   I just want  
14       to make sure that I understand, because the  
15       circumstantial evidence is what the plaintiffs  
16       relied on, and the whole issue is disentangling  
17       race and partisanship.

18                  I understood your brief to say, but  
19       you haven't said this yet that I heard, so I  
20       want to make sure I understand it correctly,  
21       that he did not take into account factors like  
22       contiguousness and compactness, and so he was  
23       assuming that you could have essentially kind of  
24       an island cut off in the middle of the district  
25       that would have more Black voters, which would

1 obviously then not be contiguous.

2 Am I misunderstanding that?

3 MR. GORE: That -- that's correct for  
4 his county envelope analysis, yes.

5 JUSTICE BARRETT: Okay.

6 MR. GORE: And what he also didn't do  
7 is the other piece of that, is control or test  
8 for traditional principles. That's on page 197  
9 of the Joint Appendix.

10 And what we mean by that is it would  
11 be possible to draw different lines for District  
12 1 in a county, take Charleston County or  
13 Dorchester, which are both split. But, if you  
14 want to go out and grab that other VTD, you have  
15 to make tradeoffs elsewhere because, if you're  
16 changing the shape of the district or picking up  
17 additional population from other VTDs, you have  
18 to offset that somewhere else.

19 And so what a properly done analysis  
20 does, as this Court recognized in Allen, would  
21 test whether the decisions that were made are  
22 more or less consistent with traditional  
23 principles than the decisions the expert is  
24 proposing. And Dr. Ragusa doesn't do that here  
25 because he doesn't control for traditional



1 principles like contiguity.

2 And his analysis is different than the  
3 analysis that was done and this Court credited  
4 in Cooper because of the thing I mentioned  
5 before about his regression analysis using only  
6 an average political number rather than the  
7 actual political number in each VTD.

8 JUSTICE BARRETT: And how much of a  
9 point did you make of that in the district  
10 court?

11 MR. GORE: We -- we raised many -- we  
12 raised a lot of objections to Dr. Ragusa and his  
13 methodology in the district court.

14 JUSTICE BARRETT: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Jackson?

17 JUSTICE JACKSON: Yeah, can I drill  
18 down on that a little bit? Because I think  
19 that's at the heart of one of my concerns about  
20 the burdens and some of the questions that we've  
21 heard.

22 So you put on Mr. Trende at the  
23 district court, and my understanding was that  
24 Mr. Trende did not really, as an expert,  
25 undercut the methodologies of Ragusa and the

1 other experts. Is that -- is that correct? I  
2 mean, he didn't put forward an alternative or do  
3 a kind of methodological analysis of Ragusa, did  
4 he?

5 MR. GORE: He did point out some of  
6 the flaws in -- in his expert reports, including  
7 this use of total numbers instead of  
8 percentages. He also talked about the  
9 contiguity issue in the county envelope analysis  
10 I was just discussing with Justice Barrett.

11 JUSTICE JACKSON: But you --

12 MR. GORE: He did --

13 JUSTICE JACKSON: Oh, sorry. So he  
14 did?

15 MR. GORE: He did point out some of  
16 these methodological flaws. And we pointed them  
17 out also to the district court.

18 JUSTICE JACKSON: And what if the  
19 district court disagreed? I mean, the district  
20 court ultimately relies on Ragusa's expert --  
21 expertise, and you say that you challenged,  
22 although you did not really bring an expert  
23 report that met Ragusa at the same level, but  
24 you -- you raised the objections, and the  
25 district court disagreed apparently, right?

1 MR. GORE: That's correct.

2 JUSTICE JACKSON: Okay. So I guess  
3 what I'm concerned about is that I kind of hear  
4 you wanting us to do a de novo review, as  
5 opposed to a clear error review, because, to the  
6 extent that you're now asking us to look at the  
7 flaws in Ragusa's testimony and I guess disagree  
8 with the district court's crediting that -- that  
9 -- that report, that sounds to me like de novo.

10 I understood from Cooper that the  
11 clear error standard -- and I had it here a  
12 second ago -- is a highly deferential standard,  
13 that the Court may not reverse just because it  
14 would have decided the matter differently. A  
15 finding that is plausible in light of the full  
16 record, even if another is equally or more so,  
17 must govern.

18 So to what extent do we have to credit  
19 the district court's disagreement with your  
20 objections to Ragusa's report?

21 MR. GORE: That's a great question.  
22 Let me give a couple of responses.

23 First of all, as you just read from  
24 Cooper, the court has to consider whether it's  
25 plausible in light of the entire record and all

1 of the evidence. And, here, the district court  
2 just ignored other evidence that was put  
3 forward.

4 What we are asking the Court to do is  
5 exactly what it did in Cromartie II. In  
6 Cromartie II, there was a plaintiff's expert who  
7 did an analysis of VTDs moved in or moved out or  
8 potentially available to the district. The  
9 state also put forward an expert to give the  
10 contradictory interpretation of that evidence,  
11 but the district court excluded that expert.

12 JUSTICE JACKSON: Yes --

13 MR. GORE: But, once the case --

14 JUSTICE JACKSON: -- but wasn't there  
15 other -- I'm sorry. Wasn't Cromartie II a  
16 majority/minority district scenario?

17 MR. GORE: Sure, which, again, is all  
18 the more reason why the racial target theory in  
19 this case just makes no sense, because there's  
20 no motive -- clear motivation for --

21 JUSTICE JACKSON: No, I understand.  
22 You're sort of shifting. I guess I'm just  
23 trying -- so keep going.

24 MR. GORE: But -- but -- yes.

25 JUSTICE JACKSON: Cromartie II --

1 MR. GORE: So Cromartie II --

2 JUSTICE JACKSON: -- you're asking us  
3 to do the same thing?

4 MR. GORE: -- we had exactly the same  
5 situation with the experts. The district court  
6 had excluded the defense expert, so that expert  
7 wasn't really considered by this Court on  
8 review, but this Court went through as part of  
9 clear error to ensure that the district court  
10 had not relied on -- relied on clearly erroneous  
11 expert testimony and a bad methodology. That's  
12 what most of Cromartie II found.

13 JUSTICE JACKSON: But how does clear  
14 error work in that? Like, I understood the  
15 standard now, post-Cooper, to be is it plausible  
16 that the district court could have relied on  
17 Ragusa's testimony and could have found it to be  
18 reliable? And in the absence of a defense  
19 expert that's actually poking methodological  
20 holes in it, I think you have a hard time, you  
21 know, if our burden is just to say was it  
22 plausible that the district court got it right  
23 in terms of the -- of the crediting of Ragusa's  
24 report?

25 MR. GORE: I don't think that's what

1 the -- exactly what the clear error standard  
2 requires.

3 JUSTICE JACKSON: All right. So tell  
4 me what it requires.

5 MR. GORE: It says: Is the district  
6 court's finding of predominance as -- as a  
7 finding plausible in light of the whole record?

8 JUSTICE JACKSON: And that --

9 MR. GORE: It doesn't mean --

10 JUSTICE JACKSON: -- includes both the  
11 expertise and also the district court's  
12 credibility findings? Which is another sort of  
13 aspect of this that I really wanted to pin down.

14 You say the district court ignored  
15 other evidence. But it did have a trial, and it  
16 had the actual person who drew the maps come in,  
17 and there's testimony in the record where the  
18 court itself is questioning directly, not  
19 relying on the attorneys, but actually putting  
20 questions to that -- that map drawer. And I'm  
21 just wondering how we are to assess the court's  
22 determination that it disagreed with or didn't  
23 believe the expert when he said, I was looking  
24 at -- at partisanship and not race.

25 MR. GORE: There was -- it was not a

1     credibility determination because the court  
2     never based that on his demeanor on the witness  
3     stand or at trial. The court credited other  
4     evidence, but there was also other evidence the  
5     court didn't even discuss, such as the direct --

6             JUSTICE JACKSON: So are you saying  
7     the court could not have disagreed -- I mean,  
8     they asked him the question, moving that line up  
9     into the African American areas of North  
10    Charleston you would say was for a partisan  
11    lean, correct? And the witness says yes. And  
12    they ultimately find that that's not so.

13            So why isn't that a -- a -- a finding,  
14    I disagree, I don't believe you?

15            MR. GORE: A credibility  
16    determination, as we pointed out in our reply  
17    brief, requires a determination about the  
18    demeanor of the witness on the stand.  
19    Otherwise, district courts could always wrap  
20    their fact findings in credibility  
21    determinations in an -- in an attempt to avoid  
22    review. They didn't even do that here. There  
23    isn't that kind of classic credibility  
24    determination.

25            But even setting that aside, there was

1 all kinds of direct testimony from Senator  
2 Campsen, who was the sponsor of the bill, from  
3 Senator Massey, who was the Senate Majority  
4 Leader, from Representative Jordan, who also  
5 testified about text messages in the record.

6 JUSTICE JACKSON: So what would a  
7 plaintiff have needed -- and this is my final  
8 question. I'm short on time. What would a  
9 plaintiff have need -- have needed in your view,  
10 direct evidence, a statement that says we are  
11 using race and not partisanship in this  
12 particular area?

13 MR. GORE: That or an alternative map  
14 that disentangled the two or, if you think the  
15 alternative map's not required, a full  
16 evidentiary picture that showed that traditional  
17 principles actually were subordinated to race.  
18 And, here, there's been no showing for the  
19 reasons I just discussed with Justice Kavanaugh  
20 --

21 JUSTICE JACKSON: Thank you.

22 MR. GORE: -- the line in Charleston  
23 County complies with traditional principles.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,



1 counsel.

2 Ms. Aden.

3 ORAL ARGUMENT OF LEAH C. ADEN

4 ON BEHALF OF THE APPELLEES

5 MS. ADEN: Mr. Chief Justice, and may  
6 it please the Court:

7 No party disputes Cooper's basic legal  
8 rule that absent a compelling interest, race  
9 cannot predominate in line drawing, even as a  
10 means to achieve a partisan goal. Here, the  
11 panel properly concluded that race predominated  
12 over partisanship in CD1's design based on  
13 strong factual findings, including that after  
14 map drawers moved more than 193,000 people in  
15 and out of CD1, its BVAP remained identical as  
16 in the 2011 map.

17 In so doing, mapmakers sorted more  
18 than 30,000 Black Charlestonians based on their  
19 race, removing 11 of the 12 precincts with the  
20 highest Black Voting-Age Populations. This  
21 massive movement disregarded the least change  
22 approach that the state applied state-wide and  
23 that mapmakers admitted they abandoned only in  
24 Charleston County, which had been CD1's  
25 historical anchor.

1                   Disentangling race and party  
2       affiliation using the very methods this Court  
3       accepted in Cooper, the panel credited the  
4       unrebutted expert testimony that race was a  
5       better predictor than partisan affiliation for  
6       the design of CD1.

7                   Under the clear error review standard,  
8       this Court should affirm the panel's factual --  
9       racial gerrymandering factual finding because it  
10      is more than plausible in light of the total of  
11      the record. Appellants also cannot show that  
12      the panel committed a legal error, particularly  
13      in its rejection of the alternative map  
14      requirement.

15                  Finally, the record here is indeed the  
16      inverse of Cromartie II, where a majority of  
17      this Court determined that mapmakers designed  
18      the district using political voting behavior  
19      over time rather than relying upon racial  
20      stereotypes.

21                  Here, by contrast, the panel found  
22      non-credible the Appellants' assertion that they  
23      relied on merely 2020 partisan performance data  
24      for CD1's design.

25                  I welcome the Court's questions.

1 JUSTICE THOMAS: Counsel, we normally  
2 have an alternate map in these redistricting  
3 cases, and, of course, we don't have one here.  
4 In these instances where you have a high  
5 correlation between race and political  
6 affiliation, how would you constitutionally  
7 disentangle them?

8 MS. ADEN: We have something we  
9 believe that was better, if not comparable, to  
10 an alternative map. We have this unrebutted  
11 testimony of Dr. Ragusa. That testimony is  
12 corroborated by the testimony of Dr. Liu.

13 If you look at the amici briefs of the  
14 political scientists, who performed the analysis  
15 in Cooper, they validate that the methods that  
16 Dr. Ragusa and Dr. Liu used are the same as in  
17 Cooper. All of the potshots that are made by  
18 the defendants in their brief about Dr. Ragusa's  
19 analyses and Dr. Liu's, almost all of them,  
20 nearly all of them, and I can walk you through  
21 them, were made during either discovery or  
22 during Daubert motions or at trial, and the  
23 court simply didn't reject them.

24 It is unrebutted evidence  
25 disentangling race and party, which is a form of

1     circumstantial evidence, but akin to an  
2     alternative map. If you look at Dr. Ragusa's  
3     rebuttal report, Figure 1, he charts out all the  
4     VTDs in CD1, and he looks at the -- whether the  
5     racial part -- composition or the political  
6     composition determines their placement in the  
7     map. And you can see that four of the five  
8     heaviest Black precincts were moved out of CD1.  
9     By contrast, only five of the 17 majority white  
10    precincts were removed from CD1.

11                 And this is, again, unrebutted  
12    testimony, and it serves the purpose of an  
13    alternative map because this Court unanimously  
14    in Desert Palace said that there is no  
15    particular form of proof a plaintiff needs to  
16    show in an equal protection case.

17                 CHIEF JUSTICE ROBERTS: Counsel, we  
18    have said that the burden that you're assuming  
19    of disentangling race and politics in a  
20    situation like this is very, very difficult, but  
21    it is your burden, right?

22                 MS. ADEN: Yes, Your Honor.

23                 CHIEF JUSTICE ROBERTS: And -- and  
24    you're trying to -- to carry it without any  
25    direct evidence, with no alternative map, with

1 no odd-shaped districts, which we often get in  
2 gerrymandering cases, and with a wealth of  
3 political data that you're suggesting your  
4 friends on the other side would ignore in favor  
5 of racial data.

6 Have we ever had a case like that with  
7 that combination? We usually are looking for  
8 those sorts of things and we have those. Have  
9 we ever had a case before where all it is is  
10 circumstantial evidence?

11 MS. ADEN: I -- I wracked my mind and  
12 I think the closest we might come to it is a  
13 case like Gomillion, where plaintiffs would have  
14 lost there if they had been required to have  
15 proved by direct evidence where the  
16 circumstantial evidence was overwhelming.

17 But, here, if you're asking whether  
18 there is direct evidence that the legislature  
19 admitted in the 21st Century that they sorted  
20 voters on the basis of race as a means to  
21 achieve their political goal, no, we do not have  
22 that.

23 But what we do have is a factual  
24 finding that the mapmakers had Maptitude data  
25 with race data --

1 CHIEF JUSTICE ROBERTS: I understand  
2 that, and there's a lot of back-and-forth on it,  
3 and you certainly have the clear error standard  
4 in reviewing that.

5 But we've never had a case where  
6 there's been no direct evidence, no map, no  
7 strangely configured districts, a very large  
8 amount of political evidence, whether the  
9 district court chose to credit it or not, and,  
10 instead, it all resting on circumstantial  
11 evidence.

12 Circumstantial evidence to -- to  
13 determine what we held as recently as in Allen  
14 last year is something that is peculiarly in the  
15 province of the states in drawing the districts.

16 I -- I'm not saying you can't get  
17 there, but -- but it does seem that this is the  
18 -- this would be breaking new ground in our  
19 voting rights jurisprudence.

20 MS. ADEN: Respectfully, I disagree.  
21 I mean, we have strong -- this is not Cromartie.  
22 We have strong circumstantial evidence where  
23 we're not relying upon -- the Court did not rely  
24 upon forgone alternatives or conclusions about  
25 what happened.

1                   We have a racial target that the fact  
2                   that the Senate was proposing various maps over  
3                   the legislative process and moving 193,000  
4                   people around and they can only explain it as  
5                   being by coincidence, the fact that the question  
6                   in a Shaw case is whether there was a  
7                   significant sorting of Black voters on the basis  
8                   of -- of voters on the basis of race.

9                   We have 30,000 Charlestonians moved  
10                  out of CD1, out of their home county. It cannot  
11                  be explained by least change, the priority  
12                  principle that they said was guiding their map  
13                  for much --

14                  CHIEF JUSTICE ROBERTS: But just to --

15                  MS. ADEN: -- of the legislative  
16                  process.

17                  CHIEF JUSTICE ROBERTS: Sorry to  
18                  interrupt. And that is to change the voting  
19                  percentage in that district by how much?

20                  MS. ADEN: Ultimately, it was by  
21                  1.36 percent, and Senator Campsen used that  
22                  1.36 percent, the lead sponsor, to disclaim that  
23                  this was a partisan gerrymander during the  
24                  legislative process.

25                  So the court accepted that they had a

1     legitimate means to achieve this political goal.  
2     We don't dispute that. The court accepted that  
3     they had this preference to bring in political  
4     counties, but what the court acknowledged is  
5     that when they brought in those counties, there  
6     were Black people brought in alongside with  
7     them.

8                 That then led to an increased BVAP in  
9     CD1 that became too politically risky. And for  
10    the Black people they brought in, they offset  
11    the Black people by --

12                CHIEF JUSTICE ROBERTS: This is --

13                MS. ADEN: -- by expelling them from  
14    Charleston County. And that goes to the heart  
15    of this Court's jurisprudence of using race as a  
16    means, even for a legitimate political goal, as  
17    --

18                CHIEF JUSTICE ROBERTS: Well, it's  
19    not -- just so I understand correctly, this is  
20    not a voting rights case, right?

21                MS. ADEN: This is a --

22                CHIEF JUSTICE ROBERTS: It's not --  
23    it's a gerrymandering case, right? And they did  
24    all of these things to increase the percentage  
25    of the voters they wanted in that district by



1 1.6 percent?

2 MS. ADEN: 1.36 percent.

3 CHIEF JUSTICE ROBERTS: 1.3 percent.

4 MS. ADEN: Mm-hmm. Close enough. But  
5 whether --

6 JUSTICE ALITO: You had -- I'm sorry.

7 MS. ADEN: Yes.

8 JUSTICE ALITO: You had four  
9 sophisticated experts, right?

10 MS. ADEN: Yes.

11 JUSTICE ALITO: Is there any reason  
12 why one or more of them could not have drawn up  
13 an alternative map that met the legislature's  
14 stated partisan goal but had a different effect  
15 on the racial composition?

16 MS. ADEN: Because, once again, we  
17 think that we proffered evidence that was as  
18 good as, if not comparable to, an alternative  
19 map, you can --

20 JUSTICE ALITO: But you admit they  
21 could have done that? It wouldn't have been a  
22 big burden for them to do that?

23 MS. ADEN: Well, I would submit --

24 JUSTICE ALITO: And they didn't do it?

25 MS. ADEN: -- that the legislative

1 record reflects that the partisan justifications  
2 did not become clear until midway through trial.  
3 For most of the legislative session, most of  
4 discovery in the case, the map -- enacted map  
5 was defended as being compliant with traditional  
6 redistricting principles. It only --

7 JUSTICE ALITO: I mean, this whole  
8 case -- this whole case is about -- is about  
9 disentangling race and politics, right? That's  
10 what the whole case is about.

11 MS. ADEN: But the justification for  
12 the map was largely based upon traditional  
13 redistricting principles until trial. Then, at  
14 trial, the lead counsel says this was about  
15 partisanship, this was about -- and the map --  
16 map creator says, I was instructed to make this  
17 a Republican-leaning district.

18 JUSTICE ALITO: Until --

19 MS. ADEN: -- and, alternatively, it's  
20 traditional redistricting principles --

21 JUSTICE ALITO: I'm sorry, I didn't  
22 mean to interrupt. Until trial, you thought  
23 that the state was going to defend this without  
24 making the argument that this was done to  
25 increase Republican chances in District 1?

1 MS. ADEN: Yes, because it was not --

2 JUSTICE ALITO: Really?

3 MS. ADEN: -- because it was not in  
4 the guidelines for the legislature that they  
5 were achieving a political goal. There are  
6 statements that we have included in our brief  
7 that outline that people were disclaiming that  
8 this was about partisanship and this was about  
9 -- but even if -- even if --

10 JUSTICE ALITO: You didn't see that in  
11 the discovery? You had very extensive  
12 discovery.

13 MS. ADEN: There was -- people --  
14 during -- it looked --

15 JUSTICE ALITO: They didn't say the  
16 discovery doesn't -- the -- the members of the  
17 legislature in the discovery didn't say this is  
18 what our aim was?

19 MS. ADEN: If you look to the  
20 testimony of people like Mr. Fifick, Mr.  
21 Terreni, these were counsel for the staff, they  
22 were all disclaiming in the lead-up to trial  
23 that this was about partisanship.

24 JUSTICE JACKSON: And, in fact --

25 JUSTICE ALITO: Let me come back to

1 Doctor --

2 JUSTICE KAGAN: I mean, you know the  
3 -- the -- the record better than I do, but is it  
4 a particular surprise that people did not brag  
5 about the fact that they were doing a partisan  
6 gerrymander?

7 MS. ADEN: And the court acknowledged  
8 that in its opinion, that --

9 JUSTICE KAGAN: Is it a surprise that,  
10 instead, they disclaimed that they were doing a  
11 partisan gerrymander until it got to the point  
12 where they thought we better make a case?

13 MS. ADEN: And we know that they were,  
14 notwithstanding looking at BVAP throughout the  
15 legislative process, they were running BVAP  
16 reports for every map and they were looking at  
17 the connection between racial data and political  
18 data, and because they believed, whether they  
19 were right or wrong, whether they should have  
20 relied upon one piece of partisan data or not,  
21 they were relying upon race consistently to  
22 understand the ramifications politically for  
23 their map drawing.

24 JUSTICE BARRETT: But didn't they  
25 espouse some reasons --

1 JUSTICE ALITO: Do you have -- do you  
2 have evidence of that, that they were relying  
3 extensively on race?

4 MS. ADEN: Yes. We know that, again,  
5 they were looking at race as they -- on the  
6 screen seeing how --

7 JUSTICE ALITO: Well, they had --

8 MS. ADEN: -- it factored into the  
9 data --

10 JUSTICE ALITO: -- the racial data.

11 MS. ADEN: -- and seeing how it  
12 affected the --

13 JUSTICE ALITO: Is there anything  
14 surprising that?

15 MS. ADEN: And we don't -- we don't  
16 have a problem with them looking at race data or  
17 being race-conscious. But they had no good  
18 reason to do it, and, again, they were  
19 disclaiming it.

20 JUSTICE BARRETT: But I thought  
21 counsel that needed to ensure compliance with  
22 the Voting Rights Act was asking Mr. Roberts for  
23 the racial data.

24 MS. ADEN: There was no -- there's  
25 never been a defense that they were trying to

1 draw CD1 in order to comply with the Voting  
2 Rights Act. They disclaimed that they were  
3 looking at race at all. And the court found  
4 non-credible that they were not looking at race.

5 In fact, the experts tested, do the  
6 maps -- are they more predictive based upon  
7 racial data and BVAP data than they are partisan  
8 data? They used the 2020 political data that  
9 the state said they only used. And Dr. Ragusa,  
10 corroborated by Dr. Imai, demonstrate that race  
11 was a better predictor than the only -- the only  
12 single piece of data that they had that their  
13 consultant for the Senate was telling them was  
14 unreliable for predicting political behavior  
15 over time. These are all factual findings --

16 JUSTICE ALITO: Dr. Imai ran --

17 MS. ADEN: -- they had that were  
18 provided in the record.

19 JUSTICE KAGAN: Why -- why -- why did  
20 they have so little electoral data?

21 MS. ADEN: We don't --

22 JUSTICE KAGAN: Because, I mean, it  
23 strikes me as, like, if -- if you were really  
24 using electoral data, why wouldn't you have more  
25 of it?

1 MS. ADEN: Well, they had more. They  
2 had -- in addition to the 2020 political data,  
3 they got the 2020 -- I mean, in the 2020  
4 presidential data, they had the 2020 Senate  
5 data, but they never advanced that they used  
6 that. The State Elections Commission is a  
7 defendant in this case, and they have tons of  
8 data, but they did not use it.

9 And what the record reflects is that  
10 they were consistently looking at race because  
11 they had an expectation that race was a  
12 predictor for how political outcomes would  
13 perform. This is shown in the closing argument  
14 of counsel, my friend, who showed the connection  
15 between race and party in his closing. But he  
16 was relying upon racial reports and some  
17 partisan reports that were being generated  
18 during the legislative process.

19 And, once again, it is more than  
20 plausible that the court said in the total of  
21 evidence that the fact that there was this  
22 consistency in the BVAP, despite the fact that  
23 maps were changing over time, the House even  
24 tried to propose a map that was 20 percent BVAP,  
25 and Senator Campsen intervened, and then the

1 House ultimately adopted a map with the BVAP.  
2 The National Republican Redistricting Trust was  
3 proposing maps around 17 percent.

4 In the colloquy with Mr. Roberts, the  
5 court asked: What would happen if you bring in  
6 VTDs or counties that maybe are not majority  
7 Black but are below majority Black? Would that  
8 affect the overall BVAP of your district? And  
9 he acknowledged that it would. So --

10 JUSTICE ALITO: Well, when race and --  
11 when race and partisanship are so closely  
12 aligned, as they are in fact, why is it  
13 surprising that a legislature that is pursuing a  
14 partisan goal would favor a map that turns out  
15 consistently to have the same BVAP?

16 MS. ADEN: Because, if they're using  
17 race as the means to get there, this Court last  
18 term said that a legitimate interest cannot be  
19 achieved --

20 JUSTICE ALITO: Yeah.

21 MS. ADEN: -- with illegitimate ends.

22 JUSTICE ALITO: Yeah, if they're -- if  
23 that's what they're using. But, if they are  
24 disregarding race entirely and looking only at  
25 politics, where race and politics are so closely



1 aligned, it isn't surprising that when you want  
2 to get a district that has a certain Republican  
3 percentage, you're going to get a district that  
4 has a -- a -- a steady BVAP.

5 MS. ADEN: Two responses to that.  
6 Even if the mapmaker wasn't just looking at race  
7 in the actual documents, the court credited that  
8 it was in his mind and that all the evidence  
9 reflects that they were looking at race. The  
10 fact that they were trying to keep it at  
11 17 percent reflects that it had worked at  
12 17 percent prior to 2018. It worked at  
13 17 percent after 2018. They were defending this  
14 map as being least change, a map that had  
15 pre-cleared the Department of Justice, that had  
16 survived a constitutional challenge. And,  
17 again, the lead sponsor said we only wanted to  
18 make this a little bit more Republican-leaning  
19 at trial.

20 So they served their purpose, but at  
21 the heart of this, they served their purpose by  
22 focusing on the -- the precincts with the  
23 highest BVAPs, leaving alone white precincts  
24 with -- in -- in Charleston and moving out Black  
25 precincts and pushing them --

1 JUSTICE KAVANAUGH: What about West  
2 Ashley? Your opposing counsel mentioned West  
3 Ash -- West Ashley was moved out. So just give  
4 you a chance to respond to that.

5 MS. ADEN: West Ashley is cited by the  
6 court. This is a historic community that has a  
7 lot of mixed precincts, but what we see is that  
8 the entirety of --

9 JUSTICE KAVANAUGH: It's predominantly  
10 white, isn't it?

11 MS. ADEN: It's predominantly white,  
12 but the precincts with the highest and most  
13 significant Black populations, those were  
14 targeted for movement. And the court recognized  
15 that, yes, white voters may be overall impacted  
16 by this map, but because there is a White versus  
17 Regester reality on the ground look by this  
18 three-judge panel, they recognized that there  
19 were some mixed precincts. There were white  
20 voters impacted.

21 But the unrebutted expert evidence is  
22 that race was a better predictor for movement  
23 and that Black Democrat -- Black voters were  
24 significantly and disproportionately targeted  
25 for movement.

1                   And that is unrebutted by the state.  
2       The district court says they cannot explain the  
3       30,000 Charlestonians moved out of CD1. They've  
4       never been able to explain that --

5                   JUSTICE ALITO: Well, this -- I'm  
6       sorry. Did you want to finish your sentence?

7                   MS. ADEN: They've never been able to  
8       explain that significant sorting, which complies  
9       with the question in Shaw.

10                  JUSTICE ALITO: Yeah, I think this  
11       goes to what Mr. Gore claims is a very serious  
12       flaw in Dr. Ragusa's methodology, and I want you  
13       to talk about that. Maybe you have a good  
14       answer to his argument.

15                  So let's say the Republican  
16       legislature is intent on ensuring that District  
17       1 has a Republican lead. Then, all else being  
18       equal, which of the following two precincts  
19       would they rather include in District 1, a  
20       district with -- a precinct with 3,000 residents  
21       that went 900 to 800 for Trump, 900 votes for  
22       President Trump, 800 votes for President Biden,  
23       or a precinct with the same number of residents,  
24       3,000, that went 700 to 600 for Biden, 700,  
25       okay, 700 votes for President Biden, 600 for

1 Trump? Which one would you rather include if  
2 you're a Republican legislature that wants to  
3 produce a Republican-leaning district?

4 MS. ADEN: I would like to know two  
5 things with respect to the racial makeup of  
6 those precincts because, here, we know that the  
7 legislature knew not only the partisan  
8 performance based upon the 2020 data, but they  
9 knew the racial makeup that they --

10 JUSTICE ALITO: Well, suppose you  
11 don't know anything -- you don't know anything  
12 about race, which is what they claim, not that  
13 they know -- they didn't take race into account  
14 at all. All you had before you were those  
15 statistics: 900 to 800 for Trump, 700 to 600  
16 for Biden. You want to make it a Republican  
17 district. Which one do you want to keep in?

18 MS. ADEN: The former. But, if it --  
19 this case would be more like Cromartie if they  
20 were actually looking at pure partisan data and  
21 they were looking at partisan data voting  
22 behavior over time to make predictions.

23 JUSTICE JACKSON: Ms. -- Ms. Aden --

24 JUSTICE ALITO: Yeah. But that's the  
25 problem with --

1 MS. ADEN: But that's not this case.

2 JUSTICE ALITO: If I could just follow  
3 up.

4 That is the problem they claim with  
5 Dr. Ragusa's methodology, because he says no,  
6 you're going to -- the one you want to keep is  
7 the one with the greater number of votes for  
8 President Biden.

9 So you'd rather keep the -- the  
10 district that went 900 to 800 for Trump because  
11 there are 800 Biden votes there, as opposed to  
12 the one that went 600 -- 700 to 600 for Biden  
13 because there are fewer Biden votes there.

14 MS. ADEN: But Dr. Ragusa --

15 JUSTICE ALITO: I'm sorry -- yeah?

16 MS. ADEN: -- in his rebuttal report,  
17 I think pages 3 through 4, controls for the  
18 precinct size and, notwithstanding controlling  
19 for that in his analysis, determines that Black  
20 voters were moved out, white voters were kept in  
21 or moved in. And that is unrebutted data. So  
22 he controlled for this.

23 JUSTICE ALITO: But what I just said  
24 is his methodology, is it not? He looked at the  
25 absolute number of votes for President Biden,

1 not the percentage, not the net votes.

2 MS. ADEN: And Dr. Ragusa testified  
3 about why looking at the total net was the  
4 better methodology than the percentages, and  
5 this was tested below, and the district court  
6 did not accept these arguments.

7 And so this goes to, are we retrying  
8 expert testimony on appeal? Or do three judges,  
9 consistent with *White v. Regester*, consistent  
10 with *Cooper*, do -- are their findings of fact  
11 and credibility determines given the deference  
12 that an appellate court is to give a unanimous  
13 opinion, where, in light of the total record, it  
14 reflects that there was a racial target. It  
15 reflects that there was a significant sorting of  
16 Black people. It reflects un rebutted expert  
17 evidence of race rather than party explaining  
18 the assignment of voters. It reflects a  
19 disregard of traditional redistricting  
20 principles.

21 And all of that evidence in total is  
22 more than plausible in the record for the using  
23 race as a means to harm individual plaintiffs,  
24 Mr. Tai Scott and members of the --

25 CHIEF JUSTICE ROBERTS: Thank you.

1 MS. ADEN: -- South Carolina NAACP.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 MS. ADEN: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Thomas?

7 Justice Alito?

8 JUSTICE ALITO: Yeah, I -- I'm  
9 concerned about what has been said here earlier  
10 about Mr. Roberts. And as I -- I asked Mr. Gore  
11 about that. Is it not true that he has a long  
12 record working for the legislature and he's  
13 drawn maps for both Republicans and Democrats?

14 MS. ADEN: Yes. The panel  
15 acknowledged he has two decades of experience in  
16 which he used race every time he was drawing  
17 maps in the past but denied doing so in this  
18 case.

19 JUSTICE ALITO: I mean, at trial,  
20 Judge Gergel -- is that the correct  
21 pronunciation of his name, Gergel?

22 MS. ADEN: It is Judge Gergel, yes.

23 JUSTICE ALITO: Yeah. Judge Gergel  
24 had complimentary things to say about him. He  
25 said, I mean, I know Mr. Roberts, he's a very

1     precise guy. What I want is -- is, if that  
2     report, he's talking about a particular report,  
3     isn't accurate, and I'm persuaded if he tells me  
4     it's not, that's good enough for me.

5                 MS. ADEN: The -- and that --

6                 JUSTICE ALITO: He's complimentary of  
7     his -- of his honesty, right?

8                 MS. ADEN: Yes, and also his honesty  
9     in Footnote 9, I believe, where he recognized  
10    that a year after trial, Mr. Roberts was able to  
11    cite with specificity the racial makeup of VTDs,  
12    which was completely inconsistent with his  
13    non-credible denials that he did not look at  
14    race.

15                JUSTICE ALITO: Okay. So then the  
16    district court turns around in its opinion and  
17    says that his testimony rings hollow, so that's  
18    a nice way of saying that he lied, right?

19                MS. ADEN: Yes. And that's what this  
20    Court acknowledged was the case --

21                JUSTICE ALITO: Okay.

22                MS. ADEN: -- in Cooper with the --

23                JUSTICE ALITO: It -- it gave three  
24    reasons for it, and I want you to tell me which  
25    one of these is defensible.



1                   The third one is what you just  
2           mentioned, his in-depth knowledge of the racial  
3           demographics of South Carolina. Is that  
4           damning?

5                   MS. ADEN: No, not in and of itself,  
6           because race consciousness is not the problem.  
7           It's the incredible denial, despite all of the  
8           evidence, including his testimony, but also what  
9           the experts demonstrate and also what the  
10          movement of so many people and just the  
11          coincidence that they land on the exact same  
12          BVAP.

13                  JUSTICE ALITO: All right. That's  
14          one.

15                  The second one is Roberts failed to  
16          provide the court with any plausible explanation  
17          for the abandonment of his least change approach  
18          in drawing the Charleston County portions of  
19          Congressional District Numbers 1 and 6 or the  
20          subordination of traditional districting  
21          principles, including maintenance of  
22          constituencies, minimizing divisions of  
23          counties, and avoidance of racial  
24          gerrymandering.

25                  So they say he gave no plausible

1 explanation for that?

2 MS. ADEN: That's correct. In fact,  
3 Mr. Roberts admitted he abandoned the core  
4 priority of least change in CD1.

5 JUSTICE ALITO: Didn't -- didn't he  
6 say that his -- he was aiming to produce a  
7 Republican district?

8 MS. ADEN: They -- the Court  
9 ultimately accepted that legitimate goal, Your  
10 Honor, but the Court recognized in Cooper that  
11 using race as a means to get there is  
12 constitutionally suspect.

13 JUSTICE ALITO: Yeah. But -- but  
14 isn't that a plausible explanation for all of  
15 those things?

16 MS. ADEN: The court heard the  
17 testimony, and that testimony was not as  
18 persuasive as the racial movements, as the  
19 expert testimony that, again, they had the  
20 opportunity --

21 JUSTICE ALITO: No, but the question  
22 is --

23 MS. ADEN: -- to rebut.

24 JUSTICE ALITO: -- is it a -- is it a  
25 plausible reason? I mean, did they say we don't

1 believe Mr. Roberts because, you know, he had a  
2 shifty look on the stand and this is a guy with  
3 a partisan background? Did they say anything  
4 like that? They gave three reasons.

5 MS. ADEN: No, Your Honor. It's --  
6 it's plausible, but this Court has not asked to  
7 look anew at the record but to look at whether  
8 or not in no circumstance would it be plausible  
9 that the -- the outcome be what it is, and as a  
10 finding of fact, the court was correct.

11 JUSTICE ALITO: All right. So, in  
12 the -- and the last one is he admitted that his  
13 movement of nearly 17,000 African Americans was  
14 inconsistent with the Clyburn staff plan for  
15 Charleston County that he claimed to be  
16 faithfully following. All right.

17 Did he ever say, we followed exactly  
18 what -- what Congressman Clyburn asked us to do?  
19 Did he ever say that?

20 MS. ADEN: The state makes a big  
21 defense that their map is consistent with what  
22 Senator Clyburn or Representative Clyburn was  
23 seeking. The amicus brief shows that that is  
24 not what the record actually reflects.

25 And, more importantly, what the Court

1 found was that Representative Clyburn's partial  
2 map did not treat the area of West Ashley, which  
3 was so critical to the VTDs that were moved out  
4 that sorted voters on the basis of race -- the  
5 partial map that Representative Clyburn put  
6 forward did not harm West Ashley in the same  
7 way.

8 JUSTICE ALITO: Let me come back to  
9 the question I asked about why your experts did  
10 not produce an alternative map.

11 Dr. Imai produced 10,000 maps, right?

12 MS. ADEN: Correct, for one  
13 simulation.

14 JUSTICE ALITO: Yeah, he ran a  
15 simulation with 10,000 maps. He never  
16 considered politics?

17 MS. ADEN: As Dr. Imai's testimony  
18 reflects, that he tested for the criteria that  
19 the state was saying they were using in their  
20 guidelines, the objective criteria, and Dr. Imai  
21 and Dr. Duchin's methods are merely useful in  
22 this case as further support as the district  
23 court recognized to show that race was a  
24 significant factor in the design.

25 JUSTICE ALITO: Well, in a -- in a

1 case that's all about disentangling race and  
2 politics, how can we possibly give any weight to  
3 an expert report that did not take politics into  
4 account at all purportedly?

5 MS. ADEN: The district court was  
6 confronted with that question and relied upon  
7 Dr. Imai's testimony for the findings that it  
8 thought were probative or not of the issue, but  
9 we do have the Dr. Ragusa and the Dr. Liu  
10 un rebutted testimony that did disentangle race.

11 And that served the purpose of an  
12 alternative map because we can look at Figure 1  
13 in the rebuttal report that Dr. Dagusa includes  
14 and look at the VTDs that were available to be  
15 moved in in a white -- heavily white precincts  
16 that were available to be moved in and those  
17 simply were not moved in.

18 So they served the same purpose as an  
19 alternative --

20 JUSTICE ALITO: The defense expert,  
21 Sean Trende or Trende, evaluated Dr. Ragusa's  
22 maps and found that Democrats would win District  
23 1 in over 90 percent of the maps that Dr. Ragusa  
24 produced.

25 Did Dr. Imai run a simulation using

1 the political data as well but then decide to  
2 shelve it when the results were not favorable to  
3 your client?

4 MS. ADEN: That is not what I believe  
5 the record reflects, Your Honor.

6 JUSTICE ALITO: It just never occurred  
7 to him that politics might have something to do  
8 with this?

9 MS. ADEN: Every expert, as I believe  
10 Justice Kagan said, is being tasked with  
11 particular questions. Not every -- I do not  
12 believe that there's any requirement that every  
13 expert look at every decision that one might go  
14 into a map.

15 Each expert looks at different things.  
16 Dr. Ragusa and Dr. Imai -- I mean Dr. Ragusa and  
17 Dr. Liu served the purpose of disentangling and  
18 showing that race was more predictive than party  
19 affiliation.

20 Dr. Imai and Dr. Duchin helped counter  
21 this narrative that this was a race-blind draw  
22 when all of the evidence demonstrates otherwise.  
23 And, frankly, Dr. Duchin's testimony looked at  
24 all of the traditional redistricting principles.

25 And I would submit that these were all

1 raised pre-trial, and this is the type of --  
 2 this is what trial courts are given the  
 3 authority to do, not to have what is happening  
 4 here, but as relitigating the validity of expert  
 5 testimony that the court accepted.

6 JUSTICE ALITO: All right. Dr. Imai  
 7 did not control for politics. Did the district  
 8 court rely on Dr. Liu?

9 MS. ADEN: The court did not  
 10 specifically rely upon Dr. Liu, but his  
 11 analyses, as the amici of the political  
 12 scientists who did the work in Cooper,  
 13 corroborate that he used the same methods that  
 14 were faithful to Cooper, and his analyses  
 15 substantiate Dr. Ragusa's and point in the same  
 16 direction --

17 JUSTICE ALITO: Did Doctor --

18 MS. ADEN: -- that race was a better  
 19 predictor than partisanship.

20 JUSTICE ALITO: I'm sorry. Did  
 21 Dr. Duchin control for politics?

22 MS. ADEN: She did in some of her  
 23 analyses. If you look at one of her  
 24 supplemental reports, she looked at how the maps  
 25 were fair when you put particularly the

1 candidates of choice of Black voters on the map,  
2 and she determined that Black candidates  
3 performed worse in the enacted map than generic  
4 partisan races, which were essentially white-on-  
5 white races. So that is one way that she looked  
6 at partisanship.

7 But she did not do a disentangling  
8 method if that is what you're getting at.

9 JUSTICE ALITO: Okay. Last question.  
10 I'm sorry to go on for so long.

11 Did Dr. Liu and Dr. Ragusa use the  
12 county envelope method?

13 MS. ADEN: They both did, correct.

14 JUSTICE ALITO: Is that -- is that a  
15 sound method?

16 MS. ADEN: It is. It's what  
17 Dr. Ansolabehere and Dr. Max Palmer used in  
18 Cooper and Bethune-Hill, respectively.

19 JUSTICE ALITO: Under that method, if  
20 there are two people who live in the same  
21 apartment building, under the county envelope  
22 method, could one -- does the analysis take into  
23 -- presume that one can be moved and the other  
24 can't?

25 MS. ADEN: I believe --



1 JUSTICE ALITO: One could stay in --  
2 in -- in a district and the other could move?

3 MS. ADEN: I do not believe that's the  
4 case because he's looking -- the county envelope  
5 method is relying upon precincts, and so it  
6 would not be at that level of detail.

7 JUSTICE ALITO: Does it assume that a  
8 -- that all precincts could be moved, regardless  
9 of their location?

10 MS. ADEN: Only those within the  
11 county envelope, which is reflective of the fact  
12 that a county like Berkeley or a county like  
13 Beaufort was wholly moved into CD1, so it was  
14 fair for Dr. Ragusa and Dr. Imai to assume that  
15 any VTD in those counties could have been moved  
16 into CD1. And where we saw that they were not  
17 is where Black voters were at issue.

18 JUSTICE ALITO: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor?

21 JUSTICE SOTOMAYOR: I understood the  
22 record the way you did, but I understood that  
23 Dr. Liu was asked to produce maps that were  
24 consistent with the traditional criteria that  
25 the state indicated it had used, correct?

1 MS. ADEN: That is correct, Your  
2 Honor.

3 JUSTICE SOTOMAYOR: So he never looked  
4 at partisanship because that wasn't one of the  
5 criteria that it at first said it had used,  
6 correct?

7 MS. ADEN: That is correct, Your  
8 Honor.

9 JUSTICE SOTOMAYOR: So I know it seems  
10 strange, but as I understood the record -- and I  
11 know Justice Alito thinks that it should have  
12 been assumed that partisanship would be the  
13 defense -- do you know if the answer in this  
14 case raised partisanship as a defense?

15 MS. ADEN: I do not believe so.  
16 Again, the legislature almost entirely  
17 predicated their line-drawing during the  
18 legislative process on traditional redistricting  
19 principles.

20 JUSTICE SOTOMAYOR: So you were  
21 relying on what they said during the process?

22 MS. ADEN: What they said. And this  
23 Court has been skeptical when legislatures have  
24 come up with post-hoc justifications. But  
25 what's important here is that the legislature --

1 the court -- the panel accepted their  
2 justification, presumed that they would not  
3 admit it and then still allow plaintiffs to test  
4 whether that was the true reason behind the  
5 line-drawing and found that it was not. It was  
6 less of a predictable case.

7 JUSTICE SOTOMAYOR: So what your  
8 experts showed was that everything they said  
9 during the legislative process had to be  
10 race-based in some way because that's what the  
11 evidence showed. They couldn't explain the  
12 large movement of Blacks as opposed to whites,  
13 Blacks as opposed to -- or Democrat, Democratic  
14 whites and Black. So they had to come up with a  
15 different reason for why they did what they did,  
16 correct?

17 MS. ADEN: There were indeed shifting  
18 reasons, and race as a means for a political  
19 goal is constitutionally suspect.

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?  
22 Justice Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: On the least  
25 change point that you mentioned, my

1 understanding, but I want to get your  
2 understanding of the record, was that Senator  
3 Campsen wanted Beaufort and Berkeley Counties to  
4 be kept whole, he wanted a stronger Republican  
5 tilt, and he wanted Representative Clyburn to  
6 represent some of Charleston County because of  
7 Representative Clyburn's clout in the -- in the  
8 Congress and with the administration.

9 So, if you -- if those things are  
10 accurate -- and I just want your understanding  
11 of the record -- then doesn't that mean you  
12 couldn't draw the first district without some  
13 significant changes?

14 MS. ADEN: Those are generally the  
15 findings of the court, but the court recognized  
16 and detailed in its opinion that when Beaufort,  
17 when Berkeley, when Dorchester were brought in,  
18 they had Black neighbors, and those Black  
19 neighbors increased the BVAP in CD1 to a  
20 politically risky 20 percent and Black  
21 Charlestonians were offset.

22 Black people were treated one-to-one,  
23 traded one in, one out. White voters, the  
24 Republican-leaning ones, were individualized and  
25 allowed to come into CD1, and white Democrats

1     were even kept in or individualized and allowed  
2     to remain in CD1.

3             It's only Black people in the design  
4     of this district that were treated with racial  
5     stereotyping, which is offensive to this -- the  
6     Constitution.

7             JUSTICE KAVANAUGH: Right. I  
8     understand that principle, of course. But West  
9     Ashley was predominantly white and predominantly  
10    Democratic and then was moved out, right?

11            MS. ADEN: Yes, but there were  
12    significant, still heavily Black precincts --

13            JUSTICE KAVANAUGH: Right.

14            MS. ADEN: -- that were moved out  
15    alongside of it. And the court addressed this  
16    matter --

17            JUSTICE KAVANAUGH: Your point is  
18    there's a higher percentage then of Blacks than  
19    whites moved out?

20            MS. ADEN: And -- and the court --

21            JUSTICE KAVANAUGH: Is that right?

22            MS. ADEN: That is correct.

23            JUSTICE KAVANAUGH: Because there were  
24    a lot of white people moved out of District 1 in  
25    West --

1 MS. ADEN: That is correct. And the  
2 court confronted the net effect argument in its  
3 opinion. And when you look at the paragraph  
4 about Deer Park, it talks about how you may have  
5 a precinct that has 10,000 white people in it  
6 and another precinct that has 8500 Black people  
7 in it, still a minority but still substantial,  
8 and the movement of those precincts would  
9 notwithstanding affect the overall BVAP of a  
10 district.

11 And that's exactly what the court  
12 considered and confronted. This is not a new  
13 argument being raised. It was considered by the  
14 court and it was rejected in its racial  
15 gerrymandering finding.

16 JUSTICE KAVANAUGH: The other side  
17 makes a point that the original plan that came  
18 from Representative Clyburn's office actually  
19 had a lower Black voting population for District  
20 1 than what ultimately emerged. I just want to  
21 get your response to that and the relevance of  
22 that in the overall record.

23 MS. ADEN: I think it's irrelevant  
24 because I don't think that his map determined  
25 the -- the sorting that was actually done by the

1 key decisionmakers that the court acknowledged.

2 But even more, if you look to the  
3 amici brief that Representative Clyburn's office  
4 offers in this case, they provided a partial  
5 map, and then, from there, the state drew out  
6 the -- a partial map of one district, and from  
7 there, drew out the other six districts.

8 So we have no idea what the BVAP of  
9 CD1 would be based upon what the record reflects  
10 Representative Clyburn was seeking in CD6. And  
11 that is detailed in the amici brief that he  
12 submitted.

13 JUSTICE KAVANAUGH: Yeah. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Barrett?

16 Justice Jackson?

17 JUSTICE JACKSON: So I guess I'm still  
18 struggling with this clear error standard and  
19 the application in this context. Justice Alito  
20 asked a number of questions about the reasons  
21 that the district court highlighted for why it  
22 did not credit Mr. Roberts' testimony.

23 And I guess, consistent with what I  
24 understood the clear error standard to require  
25 of us, I didn't know that we were to evaluate

1     whether we agreed or disagreed with each of  
2     their findings, whether we would have found --  
3     you know, had a different takeaway from the fact  
4     that, you know, his testimony, the district  
5     court said it -- it rang hollow. If we thought  
6     it didn't rang -- ring hollow, would that be a  
7     basis for clear error? Do I not understand what  
8     the clear error standard is?

9             MS. ADEN: I don't believe that you  
10    do. I believe that the credibility  
11    determinations, the ability for the court, as in  
12    White v. Regester, as in Cooper, to have  
13    listened to the witnesses as clearly, given much  
14    deference by this Court, that the racial  
15    gerrymandering finding is a clear error finding  
16    and the subsidiary findings --

17            JUSTICE JACKSON: Right, but -- and  
18    the subsidiary findings --

19            MS. ADEN: -- are also --

20            JUSTICE JACKSON: -- as well so that  
21    if the district court said we don't believe he  
22    gave a plausible explanation and we look at it  
23    and we think the explanation is plausible, that  
24    distinction, the fact that we disagree with that  
25    particular subsidiary finding, is not the basis



1     for clear error, is that right?

2                 MS. ADEN: That is my understanding.

3     It's the total record.

4                 JUSTICE JACKSON: So it -- so maybe --  
5     maybe you would have clear error if, for  
6     example, the district court didn't have any  
7     subsidiary findings, if they didn't say anything  
8     about Dr. Roberts; they just say, you know,  
9     nothing maybe. But, in this case, they did have  
10    three reasons, right, why they didn't agree with  
11    him?

12                So I guess I just want to be clear as  
13    to what we're looking at from -- from the  
14    standpoint of clear error.

15                MS. ADEN: I think it's at least three  
16    reasons. And I think -- for why the court did  
17    not credit all of his reasons for why the map  
18    was drawn the way that they did. And it wasn't  
19    just that he -- the court just listened to his  
20    testimony and said I disagree with you but that  
21    -- that testimony did not align with the other  
22    facts in the record, which reflected that race  
23    predominance was occurring in this map, and that  
24    is overall a finding that's backed up not only  
25    by the unrebutted disentangling method but is

1 borne out by the state's own data.

2 JUSTICE JACKSON: All right. Let me  
3 ask about the hypothetical that Justice Alito  
4 put forward with respect to moving in 900 Trump  
5 voters versus -- you know, a district with 900  
6 Trump voters and 600 Biden voters versus a  
7 district with 700 Biden voters and 600 Trump  
8 voters.

9 I may have gotten that wrong, but I  
10 think if -- I think his point was that if  
11 politics is at play, then, clearly, you'd want  
12 to bring in the district with more Trump voters  
13 if you are trying to get a Republican tilt.

14 And I think that's -- I think that's  
15 right, but I guess what I am trying to  
16 understand is how the BVAP stays the same unless  
17 you're looking at race so that if you bring in  
18 the district with more Trump voters, the  
19 assumption I think that everybody seems to be  
20 operating under is that you would -- that  
21 district would likely have more white voters in  
22 it because race is correlating with -- with --  
23 with politics.

24 And if that's the case, then I would  
25 expect bringing that district in, the BVAP would

1 drop. And yet, here, it stayed the same, and I  
2 understood your argument to be because Black  
3 voters elsewhere were moved out, that race was  
4 used to move out Black voters in a -- when you  
5 brought in the 900 Trump voter district.

6 Is that the point that you're making?

7 MS. ADEN: That is the point that I'm  
8 making, that's correct.

9 JUSTICE JACKSON: And you're saying  
10 that that is the unlawful application of racial  
11 gerrymandering. So even though, as Justice  
12 Kavanaugh pointed out, the sort of overall BVAP  
13 remains the same, in a situation in which you're  
14 bringing in more white voters and moving out  
15 Black voters, in -- in this kind of  
16 circumstance, you're still relying on race in a  
17 way that is, you say, improper?

18 MS. ADEN: Yes. Correct. And I would  
19 only detail that not only are you moving in  
20 white voters, you're moving in Black voters, and  
21 you're not just -- and then, for those Black  
22 voters moved in, you're offsetting them by  
23 kicking out the Black Charlestonians. And  
24 that's exactly what the court details in its  
25 opinion happened here, the race as the means to

1     achieve this political goal.

2                   And I just want to acknowledge also  
3     that this is not -- I mentioned at the onset,  
4     this is not the case of Cromartie, where this  
5     Court said the plaintiffs failed to prove racial  
6     predominance because we see in the record that  
7     they were actually looking at voting behavior  
8     data.

9                   The record does not reflect -- this is  
10    the inverse of that case, where the record  
11    reflects they were looking at racial data for  
12    its predictive purpose and they were every once  
13    in a while looking at partisan data to see its  
14    connection, but they were relying upon race data  
15    and they had no good reason to do that.

16                  JUSTICE JACKSON:   And as Justice Kagan  
17    said, we -- we kind of think that racial -- your  
18    argument is that racial data was really kind of  
19    driving this because they didn't have a robust  
20    set of political data that they were drawing  
21    from in order to do this?

22                  MS. ADEN:   Because, in their mind,  
23    they were using race as a proxy for -- to  
24    predict partisan behavior.

25                  JUSTICE JACKSON:   Thank you.

1 MS. ADEN: That's what the record  
2 reflects.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 MS. ADEN: Thank you, Your Honors.

6 CHIEF JUSTICE ROBERTS: Ms. Flynn.

7 ORAL ARGUMENT OF CAROLINE A. FLYNN  
8 FOR THE UNITED STATES, AS AMICUS CURIAE,  
9 SUPPORTING NEITHER PARTY

10 MS. FLYNN: Mr. Chief Justice, and may  
11 it please the Court:

12 This Court has recognized that cases  
13 like these, where state defendants disclaim the  
14 use of race in line drawing and argue that any  
15 racial disparities are simply the result of a  
16 correlation between race and political  
17 affiliation, present special challenges for  
18 trial courts and require an especially sensitive  
19 inquiry.

20 As part of that inquiry, plaintiffs  
21 bear the burden to disentangle race and politics  
22 and show that race drove the mapmakers'  
23 decisions about where to place a significant  
24 number of voters. The district court found that  
25 plaintiffs had done that here.

1           But this Court has also been clear  
2     that on appeal, this Court's job is more  
3     straightforward. Racial predominance is a  
4     factual finding subject to clear error review  
5     even when there's a politics defense.

6           The court has also repeatedly rejected  
7     attempts to impose unjustified evidentiary  
8     hurdles as a matter of law on redistrict --  
9     redistricting plaintiffs. Defendants' arguments  
10    for reversal in this case contradict those  
11    settled principles.

12           I welcome the Court's questions.

13           JUSTICE THOMAS: If we find no intent  
14    to discriminate or to -- that there was vote --  
15    on the vote dilution claim, that's what I'm more  
16    interested in, you seem to want us to send it  
17    back on that. But, if you find -- we find no  
18    intent, should we, or should we just simply  
19    resolve it here?

20           MS. FLYNN: So our position on the  
21    second claim is that if this Court were not to  
22    affirm on the first racial gerrymandering  
23    claim --

24           JUSTICE THOMAS: Yeah.

25           MS. FLYNN: -- and not find racial

1     predominance there, that this Court should  
2     remand on the second claim because we believe  
3     the district court used the wrong legal  
4     standards to evaluate that claim.

5             JUSTICE THOMAS:   And what should that  
6     standard be?

7             MS. FLYNN:   So, first, we -- the  
8     district court simply sort of took the findings  
9     it had made on racial predominance and the Shaw  
10    standard and carried them over, but the intent  
11    standard is different for an intentional vote  
12    dilution claim.   It's the Arlington Heights  
13    inquiry that this Court --

14            JUSTICE THOMAS:   And that is -- it's  
15    the -- again, the vote dilution claim.   It seems  
16    as though those were collapsed into one another,  
17    the redistribute -- the redistricting and the  
18    vote dilution and dealt with on -- on the same  
19    standard.

20            So I'm wondering, if the standard is  
21    intent with respect to the dilution claim, if  
22    you don't see that intent here, why should we  
23    remand it?

24            MS. FLYNN:   Well, I don't think the  
25    court -- the district court made the findings

1 under the correct intent standard for you to  
2 evaluate that. I mean, as I mentioned, the  
3 district court just asked about racial  
4 predominance, but they are different intent  
5 inquiries.

6 For intentional vote dilution, you're  
7 asking about a specific intent to dilute the  
8 voting strength of the minority population, not  
9 just whether race predominated in the  
10 line-drawing decisions.

11 JUSTICE THOMAS: And you're saying we  
12 couldn't determine that on the record that's  
13 here?

14 MS. FLYNN: I think this Court should  
15 follow its usual practice and instruct the lower  
16 court about the correct legal standards and then  
17 send it back for that decision, determination to  
18 be made in the first instance by the court  
19 looking at the full record if the Court were to  
20 have occasion to reach that second claim.

21 JUSTICE SOTOMAYOR: I guess my  
22 question is -- I'm sorry, Chief.

23 CHIEF JUSTICE ROBERTS: Ms. Flynn,  
24 your office reviews a lot of these voting cases,  
25 right?



1 MS. FLYNN: Well, our enforcement work  
2 is typically in vote dilution, not in racial  
3 gerrymandering per se, but, yes, of course,  
4 we've been involved in these cases before the  
5 Court.

6 CHIEF JUSTICE ROBERTS: Put -- yeah.  
7 Putting that aside, have you ever supported the  
8 plaintiffs in a case in which there was no  
9 evidence of any direct discrimination, no  
10 alternative map, no oddly shaped districts, and  
11 a -- volume and volume of political data?

12 Can you think of one where your --  
13 your office has done that before?

14 MS. FLYNN: Well, I -- you know, this  
15 might be the first case where there hasn't been  
16 sort of direct evidence of an attempt at VRA  
17 compliance or the like, but I do think that --  
18 when you brought up the alternative map, I do  
19 think that the -- the plaintiffs offered expert  
20 evidence to answer that same question about was  
21 it race or was it politics that were driving the  
22 line-drawing decisions.

23 CHIEF JUSTICE ROBERTS: Yeah, that's  
24 one of the things I brought up. I also brought  
25 up the absence of direct discrimination, the

1     absence of oddly shaped districts, the lack of  
2     -- I mean, the great volume of political  
3     evidence, and throw in another one, anything  
4     that all of that has been done, it is alleged on  
5     racial basis, to change the population in the  
6     district of the desired voters by 1.3 percent?

7     I mean -- I mean, my point is -- is a clear one.

8             Have you ever seen anything like this?

9             MS. FLYNN: Well, this Court has  
10     affirmed, I believe, on a circumstantial record  
11     I think in North Carolina versus Covington. The  
12     Court said that there, the state was completely  
13     denying using race. The legislature told its  
14     mapmaker not to look at race. And this Court  
15     still said it was permissible for the district  
16     court to find based on demographic information  
17     and information about the shape of the district  
18     that race was, in fact, relied upon.

19            I'd also say that here, the district  
20     court did look at traditional redistricting  
21     principles and find that they were subordinated  
22     in this instance. For instance, this new  
23     district is not contiguous when the previous  
24     district was.

25            Of course, there was previously a

1 Charleston County divide, but this is I don't  
2 think the case that the traditional districting  
3 principles wholly supported the state's story  
4 here.

5 And I will sort of go back to the  
6 expert evidence in this case. In our view, we  
7 think the Ragusa expert and Liu were the most  
8 probative on the question we've been talking  
9 about today, which is was it race or was it  
10 politics that were driving the district lines.

11 And Dr. Ragusa took the methodology in  
12 Cooper, arguably improved upon it by looking at  
13 VTDs at precincts rather than voter by voter,  
14 which is what the Cooper expert did, and then he  
15 also ran a regression analysis to further  
16 isolate out the effect of race from politics.

17 JUSTICE GORSUCH: Counsel, I -- I -- I  
18 want to just explore the alternative map  
19 non-requirement requirement thing for a minute.

20 MS. FLYNN: Sure.

21 JUSTICE GORSUCH: Everybody seems to  
22 take as given that the legislature here did seek  
23 to pursue a partisan gerrymander, if you will,  
24 or a partisan tilt, I think, is their preferred  
25 term, and that that's permissible under this

1 Court's precedents. We start with that as a  
2 given.

3 MS. FLYNN: Mm-hmm.

4 JUSTICE GORSUCH: Right?

5 MS. FLYNN: Yes.

6 JUSTICE GORSUCH: Okay. And that the  
7 plaintiff bears the burden of -- of -- of --  
8 of -- of overcoming a good-faith presumption  
9 that -- that the legislature is doing just what  
10 it says, right?

11 MS. FLYNN: Mm-hmm.

12 JUSTICE GORSUCH: How do you prove  
13 that they are acting in bad faith without  
14 showing that they could achieve their objective  
15 some different way?

16 MS. FLYNN: I agree that that could be  
17 a probative piece of evidence in some cases, and  
18 I think that's what the Court said in Cooper.  
19 What we're pushing back on is the idea that you  
20 need to have, as a matter of law, for the  
21 plaintiff's case to even get off the ground, an  
22 alternative map that checks all the boxes.

23 JUSTICE GORSUCH: I -- I get that, and  
24 I'm wondering why. I mean, normally, if a  
25 plaintiff bears a burden of proof, you have to

1 show that it would have happened but for, you  
2 know, this change in the world.

3 And I think the -- here the analogy  
4 would be -- and I'm just exploring this. I  
5 don't know. All right? Could be wrong.  
6 Probably am. But in a but-for world, the  
7 legislature could have achieved its partisan  
8 purposes, nefarious, happy, whatever you think  
9 they are, in some other way without -- without  
10 doing what it did, that you're objecting to.

11 And here, there's no -- no evidence  
12 that the legislature could have achieved its  
13 partisan tilt, which everyone says is  
14 permissible, in any other way.

15 MS. FLYNN: So I --

16 JUSTICE GORSUCH: What do we do with  
17 that when -- with the presumption of good faith?

18 MS. FLYNN: So I have a couple  
19 responses to that. First, I do think the expert  
20 evidence answer the same question. An  
21 alternative map says if you were really relying  
22 on the thing you said you were relying, wouldn't  
23 you have done -- maybe you would have done this  
24 other thing instead.

25 JUSTICE GORSUCH: I could have

1     achieved the same partisan objective 15  
2     different ways, and with map-drawing technology  
3     and computers, you know, they spit out maps by  
4     the thousands these days. I would have thought  
5     that would have been a relatively modest burden.

6             MS. FLYNN: But it's --

7             JUSTICE GORSUCH: What am I missing?

8             MS. FLYNN: It's still just a way to  
9     answer the question what better explains how  
10    lines were drawn. And we think the expert  
11    evidence does that.

12            The other thing I would say about  
13    creating this kind of requirement as a legal  
14    rule, rather than something that can be a piece  
15    of evidence that both sides can make arguments  
16    about, is that I think it's going to add even  
17    more complication to these even very, very  
18    complicated cases.

19            So my understanding is that defendants  
20    want their alternative map requirement to be  
21    limited to circumstances where there is no or  
22    meager direct evidence. So I think, first,  
23    you're going to have a mini-trial on is this a  
24    case where there's sufficient direct evidence or  
25    not to bring this rule into play?

1                   And then I think you're going to have  
2                   to have litigation and probably appeals on what  
3                   the alternative map has to do.

4                   JUSTICE GORSUCH:  No, I'm not even  
5                   asking about -- I'm -- I'm -- I'm really not  
6                   interested in whether it's a requirement or not.  
7                   I'm just -- just as a factual matter, wouldn't  
8                   it have been the simplest thing to do?  If I'm  
9                   plaintiff and I want to show the defendant can  
10                  achieve its permissible ends in some other way,  
11                  I think in most other scenarios, in a tort case  
12                  or an antitrust case, is what I'm thinking  
13                  about, I would show that there were 15 other  
14                  ways to achieve that which you said you wanted  
15                  to achieve.

16                  And that would -- that would be really  
17                  strong probative evidence, whether it's required  
18                  or not, put -- put that aside, that, hey, you're  
19                  not telling the truth about what you were up to  
20                  here.

21                  MS. FLYNN:  I agree it can be very  
22                  probative evidence.  I can't really speak --

23                  JUSTICE GORSUCH:  Should its absence  
24                  --

25                  MS. FLYNN:  -- to why it would be

1 easier --

2 JUSTICE GORSUCH: Should its absence  
3 here tell us something?

4 MS. FLYNN: I don't think so, because  
5 I think the plaintiffs offered two experts that  
6 went un rebutted to answer the same question.

7 I will also just point out that I  
8 believe there are maps that are in the record  
9 that did have a higher BVAP that stayed based on  
10 the 2020 election data as a Republican-leaning  
11 district. So, you know, I don't -- I believe  
12 those maps are the first House staff, plan and I  
13 think there was one from a Senator Sabb that  
14 also had that.

15 So, you know, whether -- what's  
16 easier, easiest for a plaintiff to do to prove  
17 their case, I'm not really in a position to sort  
18 of speak to their litigation choices, but --

19 JUSTICE SOTOMAYOR: That's the point,  
20 isn't it? There were maps that remained  
21 Republican-leaning that were rejected. And,  
22 instead, there was this unusual movement in and  
23 out based on race. That's what the experts  
24 showed, that you can't explain the movements  
25 based on partisanship, that they can only be



1 explained on the basis of race. That's the  
2 burden the plaintiff meets, correct?

3 MS. FLYNN: Yes.

4 JUSTICE SOTOMAYOR: I had this  
5 question as I was going through: If you can't  
6 get to where you want to go without using race,  
7 do you think our law permits that?

8 MS. FLYNN: No, Your Honor. I think  
9 the --

10 JUSTICE SOTOMAYOR: That's the whole  
11 point, isn't it? If you can't reach a goal, no  
12 matter how laudatory it is, if the only way that  
13 you can satisfy yourself, for whatever your  
14 political reasons are, is by using race, that's  
15 illegal.

16 MS. FLYNN: Right. This Court said  
17 that in Cooper and the plurality opinion said  
18 that in Bush v. Vera as well.

19 JUSTICE SOTOMAYOR: Right.

20 MS. FLYNN: You can't use race as a  
21 proxy for a political goal.

22 JUSTICE SOTOMAYOR: So the bottom line  
23 is they had maps that were created that reached  
24 -- that kept them Republican-leaning, and they  
25 chose not to use them. For whatever other

1 political reasons, what they went back to was  
2 race to make the map they made, correct?

3 MS. FLYNN: That's what the district  
4 court found, yes.

5 JUSTICE SOTOMAYOR: All right. Thank  
6 you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Justice Thomas?

10 JUSTICE THOMAS: This is just a matter  
11 of curiosity. If you can't -- your answer was  
12 you couldn't use race to draw the districts,  
13 right?

14 MS. FLYNN: Right. Well, or you would  
15 be in strict scrutiny land and perhaps VRA  
16 compliance would be a reason, but -- right.

17 JUSTICE THOMAS: But you used -- you  
18 can use race to draw a majority/minority  
19 district?

20 MS. FLYNN: Right. So if race  
21 predominates, and in that circumstance, where  
22 the overriding consideration is to draw a  
23 majority/minority district and that racial  
24 target actually dictates how lines are being  
25 drawn on the ground, I agree the first half of

1 the Shaw test would be met, and then you would  
2 be -- in the second half, you would ask the  
3 strict scrutiny question of whether or not there  
4 was a strong basis in evidence to believe the  
5 other requirement.

6 JUSTICE THOMAS: Outside of this  
7 context, do we use the predominant standard in  
8 our Fourteenth Amendment analysis?

9 MS. FLYNN: I'm not aware of another  
10 context besides gerrymandering.

11 CHIEF JUSTICE ROBERTS: Justice Alito?

12 JUSTICE ALITO: No.

13 CHIEF JUSTICE ROBERTS: Justice --  
14 anything further?

15 Justice Kagan?

16 JUSTICE KAGAN: Ms. Flynn, so it's a  
17 funny case because it's our first post-Rucho  
18 case of this kind. So before Rucho, right, you  
19 could understand completely why it was that  
20 mapmakers started doing race in order to achieve  
21 partisan gerrymanders, because they couldn't do  
22 partisan gerrymanders directly. They were  
23 afraid that that was going to be found unlawful.

24 But now that Rucho has come about and  
25 -- and all these partisan gerrymandering claims

1 have been held to be non-justiciable, you know,  
2 some people might sort of say, well, I don't get  
3 it. Like why do people keep using race when  
4 they can just do it directly? Just do -- use  
5 the election data, do the partisan  
6 gerrymandering.

7 You know, doesn't the fact that they  
8 can do it directly suggest that they're not --  
9 why would you need race as a proxy? So that's  
10 my question to you.

11 Why would mapmakers, in general and in  
12 this case, use race as a proxy to do partisan  
13 gerrymandering now that you could just, like, do  
14 partisan gerrymandering?

15 MS. FLYNN: So I don't know that I'm  
16 in a position to speak to in general, but in  
17 this case, as has been discussed earlier today,  
18 there was evidence in the record that the  
19 political data the mapmakers had available was  
20 sort of limited and imperfect. It was a single  
21 election that wasn't congressional. And it was  
22 not looking at the durability of voting across  
23 multiple elections.

24 So given the evidence that voting is  
25 racially polarized in South Carolina, it was

1 plausible for the district court to find that  
2 the mapmakers would have relied on race as a  
3 more durable proxy in the hopes of achieving  
4 their political end.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Gorsuch?

7 JUSTICE GORSUCH: Your brief also  
8 makes the point that it would have been  
9 plausible for the district court to have come to  
10 the exact opposite conclusion it came to here.  
11 And that it would have been just as plausible  
12 for them to find, as Justice Kagan alluded to,  
13 that the simplest explanation was they wanted to  
14 do politics and they did politics.

15 How does that -- how should we think  
16 about that under our clear error standard?

17 MS. FLYNN: So we've made that point  
18 in previous cases before this Court as well. We  
19 think that the clear error standard doesn't ask  
20 what is the most plausible reading of the record  
21 or whether, on the whole, more evidence supports  
22 one outcome than the other. It asks just  
23 whether the district court's is plausible based  
24 on the entirety of the evidence, and so --

25 JUSTICE GORSUCH: And how does that

1 fit with the presumption of good faith that we  
2 -- because we're reviewing state legislative  
3 actions here, that we ask people, lower courts  
4 to make sure that they're -- they're not  
5 overstepping their bounds and -- and getting too  
6 involved in state and local politics?

7 MS. FLYNN: We think the -- the  
8 presumption of good faith is sort of baked into  
9 how the burdens work here, and also that, in  
10 this particular case, the plaintiffs did have  
11 the obligation to disentangle race and politics.  
12 And we also think that the predominant standard  
13 is a very high standard that also accounts --  
14 that doesn't, you know, find predominance met  
15 based just on racial awareness or race  
16 consciousness. And so we think setting the bar  
17 that high is what affords respect to  
18 legislature's districting choices in this area.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Kavanaugh?

22 JUSTICE KAVANAUGH: Just to follow up  
23 on Justice Gorsuch's question, how would a  
24 district court look at this exact same  
25 evidentiary record and come to the opposite

1 conclusion, in your view?

2 MS. FLYNN: I think the expert  
3 evidence played a very big role here. You know,  
4 I think the district court is in a very good  
5 position to make the kind of assessments about  
6 methodology that we've been discussing here  
7 today.

8 JUSTICE KAVANAUGH: But you've looked  
9 at this record and you obviously concluded that  
10 the district court could have said no, that  
11 expert evidence is not sufficiently reliable or  
12 probative in light of the overall record to  
13 support the plaintiff's case?

14 MS. FLYNN: Well, we think that the  
15 expert evidence is a big part of it. We think  
16 that there were credibility findings here that  
17 might have come out differently with a different  
18 three-judge panel possibly. It's kind of hard  
19 to tell because we weren't there seeing the  
20 witnesses firsthand.

21 And, you know, we -- we take the point  
22 that these are just difficult cases. As this  
23 Court said in Cooper, when there is a political  
24 defense being raised and so you can often  
25 describe or attribute certain oddities in

1 district lines to being politics or race.

2 And so given that we recognize that  
3 district courts have a -- a tough job here to  
4 sort of just look at the entirety of the  
5 evidence and figure out whether or not the  
6 plaintiffs carried their burden.

7 JUSTICE KAVANAUGH: To -- to pick up  
8 on Justice Kagan's question, and I think a big  
9 theme of the other side's briefing is why would  
10 we do this when we have the political data?  
11 Justice Kagan mentioned that.

12 And that's all over the briefs and the  
13 amicus briefs on their side.

14 And then I think the main response is  
15 the political data is not good enough to achieve  
16 the end they want to achieve of a greater  
17 Republican tilt.

18 Do you agree with that?

19 MS. FLYNN: Yes. We agree there's  
20 evidence in the record for the district court to  
21 -- to find that, yes.

22 JUSTICE KAVANAUGH: Right. What if we  
23 disagree on that point about the strength of the  
24 political data? I think an earlier question  
25 Justice Kagan mentioned that that asked about



1 the reliability of that data, how probative that  
2 data is.

3 Suppose we think that data is fairly  
4 probative. Does the whole case then that  
5 plaintiffs had, the district court's conclusion  
6 then all fall because that's really the linchpin  
7 of the response to the main argument that the  
8 state is giving, which is we relied on this  
9 political data, the response is that political  
10 data is no good, so you couldn't have been.

11 If that data is good, should we  
12 reverse?

13 MS. FLYNN: No, I don't think so. I  
14 think there is also the fact that the BVAP in  
15 CD1 stayed basically frozen even after about  
16 190,000 people were being moved in and out of  
17 the district. I think there's the --

18 JUSTICE KAVANAUGH: Can't that show  
19 correlation?

20 MS. FLYNN: I'm not sure it can. I  
21 mean, I -- it's -- I'm not sure that defendants  
22 have shown that inevitably you would have  
23 arrived at that exact same BVAP given those line  
24 drawings.

25 I mean, the line drawing decision in

1 Charleston County are what we're are talked  
2 talking about, how people were moved in that  
3 area to achieve what the district court found  
4 was a racial target. So there's that.

5 There's the -- the disparities in  
6 white voters -- or Black voters being taken out  
7 and white voters being left in, even of the same  
8 political party. The district court did have  
9 credibility findings here and there was also the  
10 expert evidence that isolated out race from  
11 political affiliation and said race explains the  
12 lines here.

13 JUSTICE KAVANAUGH: Why do you think  
14 2020 presidential election data is not reliable,  
15 probative, or whatever term you want to use  
16 there, or sufficiently reliable or probative  
17 that it would have made sense to rely on that?

18 MS. FLYNN: I think looking at just  
19 one, and there's evidence in the record about  
20 all of this, but looking to just one election  
21 and not an election for the race that you're  
22 actually studying.

23 My understanding is that when we do  
24 functional analyses of voting patterns, we look  
25 at multiple elections and, you know, hope to be

1     able to look at voting patterns in races that  
2     are actually at issue with the districts we're  
3     talking about.

4                   I think there's also --

5                   JUSTICE KAVANAUGH:  Would you think  
6     looking at 2020 and figuring out were you a  
7     Trump voter or were you a Biden voter is not  
8     probative to whether you're going to vote for  
9     Nancy Mace or not in the next election?

10                  MS. FLYNN:  I think there is evidence  
11     discussing about how voters are more likely to  
12     -- at least I believe that white voters are more  
13     likely to switch over and vote for a candidate  
14     in the presidential race and not, you know,  
15     switch across party lines to do that.

16                  And given that evidence, I think it  
17     was plausible for the district court to reason  
18     that there would be a reason to rely on race in  
19     order to achieve the political goal.

20                  JUSTICE KAVANAUGH:  Okay, thank you.

21                  CHIEF JUSTICE ROBERTS:  Justice  
22     Barrett.

23                  JUSTICE BARRETT:  So I think the  
24     difficult thing about this case is that clear  
25     error review, we owe a lot of deference to the

1 district court's findings. But we're also  
2 reviewing it in light of the legal standards,  
3 and I'm not -- I'm talking about factual, I'm  
4 not talking about the arguments that there was  
5 legal error here, but we're reviewing it in  
6 light of the fact that the plaintiffs bear an  
7 exceedingly heavy burden when they're trying to  
8 disentangle race and politics and that we give  
9 the legislature a presumption of good faith.

10 So we're asking whether the district  
11 court made a clear error in light of the fact  
12 that it was judging the factual record with  
13 those things into account.

14 And the Chief Justice has outlined,  
15 you know, kind of the sum I think in a -- in a  
16 pretty concise way of the evidence which was all  
17 circumstantial here.

18 I think there's a reason why  
19 Dr. Ragusa's report keeps coming up, is because  
20 it was the best of the expert reports that  
21 actually did try to disentangle race and  
22 politics, which was the key question here.

23 And you pointed out, and -- and so  
24 did -- so did the Respondent that they didn't  
25 point out an alternative map but they had expert

1 evidence that was just as good because it made  
2 similar points, but this is my question about  
3 Dr. Ragusa's evidence.

4 Did it control for factors like  
5 contiguousness and compactness? Because  
6 Respondent pointed out in trying to address this  
7 problem, which I think is why, you know, that  
8 we've all been asking about and struggling with,  
9 that, you know, Respondents said well, some of  
10 the experts testified about traditional  
11 districting criteria and some testified about  
12 attempts to disentangle race and politics and  
13 they were all showing different things, but did  
14 anybody consider all of them?

15 Because it seems to me like that would  
16 be really relevant evidence. And I want to be  
17 sure that I'm understanding Dr. Ragusa's  
18 testimony and its assumptions accurately.

19 So what's -- what's your view on that?

20 MS. FLYNN: So the county envelope  
21 methodology essentially looks at the area from  
22 which voters, or in this case precincts, can be  
23 drawn by looking at the counties that previously  
24 constituted or overlapped with CD1, and he -- so  
25 that, I think, has these considerations built

1     into the analysis, because he's looking at, as  
2     the expert did in Cooper which the this  
3     credited, looking at basically what is the  
4     available area from which the -- the mapmakers  
5     had to draw.

6             And I will also say that, you know, my  
7     friend has made the point that, you know, it's  
8     -- your -- theoretically possible that you can  
9     go pretty deep into a county under that  
10    analysis, but that is what the mapmakers did.

11            They took in the entirety of two  
12    counties and went to their furthest reaches when  
13    they drew the map and so I think it was  
14    reasonable for Dr. Ragusa's analysis to do the  
15    same thing in figuring out the area from which  
16    he could draw.

17            JUSTICE BARRETT:   And last question:  
18    How do you think we should think about clear  
19    error review in the kind of situation that I  
20    outlined where the plaintiff's burden was so  
21    heavy below because of the good faith standard  
22    and because of the heavy burden that a plaintiff  
23    bears in trying to disentangle race and  
24    politics?

25            How do you think that should affect

1       our review of the facts?

2               MS. FLYNN: I think Cooper spoke to  
3       this and said that it doesn't affect how clear  
4       error works. It doesn't affect -- it doesn't  
5       create some kind of a pro -- pro-defendant  
6       presumption on review. It's still factual  
7       findings. It's still this Court's usual  
8       Anderson standards for looking at those.

9               JUSTICE BARRETT: Okay, thank you.

10              CHIEF JUSTICE ROBERTS: Justice  
11       Jackson.

12              JUSTICE JACKSON: Yeah, I just wanted  
13       to ask about the question that Justice Kavanaugh  
14       asked with respect to our own assessment of the  
15       presidential election data and whether or not  
16       it's reliable.

17              Is that a finding of fact or that we  
18       would owe sort of clear error review deference  
19       to the district court's determination or is that  
20       something we are apt to or allowed to take into  
21       account ourselves?

22              MS. FLYNN: I think that's evidence  
23       that's in the record that renders the district  
24       court's finding of a racial target, and the  
25       legislature's use of race plausible. So no, I

1 don't think you have to --

2 JUSTICE JACKSON: So in other words  
3 are we looking at a de novo? So like what --  
4 what result from the fact that we might disagree  
5 about the fact that the district -- about the  
6 reliability of the presidential election?

7 Do we owe the district court deference  
8 with respect to their determination that having  
9 that data, you know, was -- was not enough and  
10 that race was actually at issue here? Do we owe  
11 them any deference with respect to that?

12 MS. FLYNN: So I do want to be  
13 careful. I'm not sure there was a specific  
14 finding in the district court opinion about this  
15 question of the 2020 data.

16 JUSTICE JACKSON: I see.

17 MS. FLYNN: And so I think this is --  
18 because this Court is looking at the -- all the  
19 evidence in the record to determine whether the  
20 findings the district court made were plausible,  
21 that's why I think this is coming up.

22 JUSTICE JACKSON: Okay. And -- and  
23 with respect to this question about maps and  
24 alternative map, I'm just wondering whether or  
25 not an alternative map is helpful with respect



1 to the contention that the district was being  
2 oddly manufactured with respect to who was being  
3 moved in or out.

4 This is similar to the question that I  
5 asked plaintiff's counsel. My understanding is  
6 that politics is driving it at a sort of meta  
7 level, and the mapmaker identifies a  
8 Republican-leaning district that he would like  
9 to include. That Republican-leaning district  
10 has both white and Black voters in it.

11 And so one would assume that just by  
12 that move, the BVAP goes up. I don't know if  
13 that's right, but I'm just -- I'm walk -- I'm  
14 walking it through.

15 But in this situation, the BVAP stays  
16 the same at the end of the day and we have  
17 evidence that the mapmaker went into the rest of  
18 the district and moved out a certain number of  
19 democratic-leaning voters who happened to be  
20 Black or the plaintiffs say because they were  
21 Black, but that's what makes the BVAP remain the  
22 same. It's that we've now moved out Black  
23 Democrats to account for, I guess, the  
24 Republican-leaning district that we have  
25 included.

1                   Is the use of race in that way, you  
2                   know, I have now got a higher BVAP than I want,  
3                   and I'm moving out Black voters, not white  
4                   Democrats, Black Democrats, in order to bring  
5                   the BVAP down, is that a violation in -- in this  
6                   world?

7                   MS. FLYNN: Yes. We think that was a  
8                   very probative piece of evidence that  
9                   contributed to the district court's finding.

10                  JUSTICE JACKSON: And what would a map  
11                  do? If that's the kind of violation that I am  
12                  trying to establish as the plaintiff, I guess  
13                  what I don't understand is why having an  
14                  alternative map is going to illuminate that in  
15                  any way.

16                  MS. FLYNN: Right. I think an  
17                  alternative map could show a different way that  
18                  lines could have been drawn and show whether or  
19                  not there are different ways to do it that it  
20                  could accomplish some or all of the defendant's  
21                  goals, but I don't think it's the only way to  
22                  answer this core question of what was driving  
23                  the decisionmaking. And --

24                  JUSTICE JACKSON: And, in fact, if  
25                  this dynamic is what is really bothering me, for

1     example, as a plaintiff -- I'm putting myself in  
2     their shoes -- it doesn't necessarily even make  
3     sense to me that you would produce a map to  
4     prove that dynamic is happening. You would have  
5     expert testimony in the way that you have, you  
6     would, you know, explain it all through, but I  
7     don't -- I guess I just don't see how a map  
8     would be helpful if -- if that's the dynamic  
9     that I'm trying to focus on.

10                 MS. FLYNN: I think that it was very  
11     reasonable for plaintiffs to offer expert  
12     testimony to that. I think the other evidence  
13     speaks to it as well. I do think that cases  
14     have sort of a different mix of circumstantial,  
15     sometimes with direct, and you kind of have to  
16     take the record and see what persuasive  
17     conclusions can be drawn for it without any --

18                 JUSTICE JACKSON: So the government's  
19     position is that you don't necessarily have to  
20     have a map and you don't necessarily have to  
21     have direct evidence? We've been hearing a lot  
22     about the lack of direct evidence in this case.

23                 Is there a world in which you can put  
24     together a case that demonstrates that race is  
25     actually operative in this environment without

1 direct evidence and without a map?

2 MS. FLYNN: Yes.

3 JUSTICE JACKSON: Thank you.

4 MS. FLYNN: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Rebuttal, Mr. Gore?

8 REBUTTAL ARGUMENT OF JOHN M. GORE

9 ON BEHALF OF THE APPELLANTS

10 MR. GORE: Today's argument  
11 underscores why the alternative map requirement  
12 is so vital. It ensures that racial  
13 gerrymandering cases remain focused on racial  
14 discrimination and not partisan disputes. It  
15 also ensures that the grave finding of racial  
16 gerrymandering rests on actual evidence of  
17 racial predominance and not malleable expert  
18 analysis.

19 If Dr. Ragusa were correct that race  
20 better explains the enacted plan than politics,  
21 it should have been very easy to draw an  
22 alternative map that disentangled the two and  
23 preserved the Republican political lean in  
24 District 1. Appellees failed that requirement.  
25 They did put alternative maps into the record,

1     so they obviously had the capacity to do that,  
2     and all the alternative maps turned District 1  
3     into a majority Democratic district.

4             We've heard from counsel for the  
5     United States about two plans in the record, the  
6     House Staff Plan and the Sabb Plan. Neither of  
7     those increased the Republican tilt like the  
8     enacted plan did, and neither was as compliant  
9     with traditional districting principles, so  
10    neither of those plans would have been enacted.  
11    In fact, Senator Campsen became involved in  
12    drawing the enacted plan and sponsoring it,  
13    precisely because the House Staff Plan imperiled  
14    District 1 and threatened to turn it into a  
15    majority Democratic district.

16            Counsel for the other side mentioned  
17    Gomillion. But in Gomillion there was an  
18    alternative map because there had been prior  
19    municipal boundaries of Tuskegee that were  
20    perfectly square before the redrawing that was  
21    done in an intentionally discriminatory way. So  
22    that map also underscored that there was  
23    intentional discrimination in Gomillion, which  
24    is a totally different case from this for -- for  
25    a host of reasons, otherwise.

1           Let me address the point about  
2   election data. The district court did not find  
3   that the 2020 presidential election data was  
4   unreliable. The district court actually itself  
5   relied on that data. It used that data to  
6   illustrate the correlation between race and  
7   politics. It thought that data was reliable.  
8   And all the direct evidence showed that it was  
9   reliable, and far more reliable than racial data  
10   that doesn't address white voters and doesn't  
11   address voting and turnout.

12           The reason that the General Assembly  
13   used only one year of election data is a very  
14   simple one in the record. That 2020 was the  
15   first year that the Election Commission  
16   allocated absentee votes down to the precinct  
17   where the voter lives, instead of at the county  
18   level. So it was more accurate and finely tuned  
19   data, political data, than any election data  
20   that had come before in the history of South  
21   Carolina.

22           This is a circumstantial case with  
23   very weak circumstantial evidence. There's no  
24   direct evidence, there's no alternative map.  
25   Here, we have a plan that complied with

1 traditional districting principles in Charleston  
2 County and in District 1 and did so better than  
3 all the alternatives that were presented at  
4 trial.

5           There was a mention of contiguity.  
6 The district court also made no finding about  
7 contiguity. The enacted District 1 is  
8 contiguous. It's contiguous by water. Every  
9 plan drawn in Charleston County is contiguous by  
10 water because Charleston County contains islands  
11 and rivers. So there's nothing suspect about  
12 the contiguity of this particular plan.

13           We heard about the Covington case.  
14 That was a remedial case. That was a remedial  
15 case where the panel had already found racial  
16 gerrymandering, sent it back to the legislature,  
17 and then determined that the legislature had not  
18 adequately fixed the problem. It's not a case  
19 in which there was only weak circumstantial  
20 evidence to support a finding of racial  
21 gerrymandering.

22           We heard today that the legislative  
23 record gave no indication that the General  
24 Assembly was drawing lines based on politics.  
25 That's completely incorrect. The guidelines

1 from both the House and the Senate permitted the  
2 General Assembly to draw based on politics, to  
3 draw communities of interest based on politics.  
4 And the House guidelines went even further.  
5 They allowed the General Assembly to draw around  
6 communities of interest defined by voting  
7 behavior, which is exactly what the General  
8 Assembly did here.

9           Senator Margie Bright Matthews, who  
10 was a Democrat who opposed the enacted plan,  
11 said on the floor of the Senate that it was  
12 about politics. She even disclaimed the  
13 allegation that it was about race. She said  
14 that Senator Campsen had drawn based on how  
15 people had voted, including in West Ashley.

16           This also -- this political goal also  
17 was made clear in discovery. Mr. Roberts  
18 testified to it in his deposition. Senator  
19 Campsen, Senator Massey, and also Representative  
20 Jordan. There were production of e-mails and  
21 documents and text messages, including from  
22 Representative Jordan, establishing that the  
23 General Assembly had pursued a political goal.

24           We've heard a lot of discussion today  
25 that Mr. Roberts or others were aware of race.



1 But mere awareness of race does not prove racial  
2 predominance. The question here is whether race  
3 was actually used to draw lines in a  
4 predominantly -- in a predominant manner.

5 That did not happen on this record,  
6 and the district court's own description of what  
7 the General Assembly did disproves it. It said  
8 that the first move was to move in Berkeley and  
9 Beaufort Counties whole. Once you do that, you  
10 end up --

11 CHIEF JUSTICE ROBERTS: You can finish  
12 your sentence.

13 MR. GORE: -- you could -- you end  
14 with a district with a 20 percent BVAP that's  
15 also majority Republican.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 The case is submitted.

19 (Whereupon, at 12:09 p.m., the case  
20 was submitted.)

21  
22  
23  
24  
25

## Official - Subject to Final Review

<p><b>1</b></p> <p><b>1</b> [32] 4:12,14,25 5:21 7:1,4, 7 25:8 29:8 33:14 36:7 41: 4 43:8 44:8,11,17 46:6 47: 12 59:3 65:25 74:17,19 80: 19 84:12,23 92:24 93:20</p> <p>131:24 132:2,14 134:2,7</p> <p><b>1's</b> [2] 4:19 5:17</p> <p><b>1.3</b> [2] 64:3 105:6</p> <p><b>1.36</b> [3] 62:21,22 64:2</p> <p><b>1.6</b> [1] 64:1</p> <p><b>10</b> [2] 27:25 29:5</p> <p><b>10,000</b> [3] 83:11,15 93:5</p> <p><b>10:04</b> [2] 1:19 4:2</p> <p><b>100</b> [1] 3:11</p> <p><b>11</b> [2] 1:15 56:19</p> <p><b>12</b> [1] 56:19</p> <p><b>12:09</b> [1] 136:19</p> <p><b>13</b> [1] 37:16</p> <p><b>131</b> [1] 3:14</p> <p><b>140,000</b> [1] 44:10</p> <p><b>142</b> [1] 37:11</p> <p><b>144</b> [1] 37:12</p> <p><b>15</b> [3] 31:25 109:1 110:13</p> <p><b>15.48</b> [2] 24:16 46:7</p> <p><b>16</b> [1] 24:17</p> <p><b>16.72</b> [1] 24:17</p> <p><b>17</b> [12] 5:13 22:15,17 23:4, 12,16 24:25 59:9 71:3 72: 11,12,13</p> <p><b>17,000</b> [1] 82:13</p> <p><b>187</b> [1] 7:7</p> <p><b>190,000</b> [1] 120:16</p> <p><b>193,000</b> [2] 56:14 62:3</p> <p><b>197</b> [1] 47:8</p>	<p><b>506</b> [1] 42:22</p> <p><b>509</b> [1] 42:22</p> <p><b>51</b> [1] 41:10</p> <p><b>514</b> [1] 7:8</p> <p><b>56</b> [1] 3:7</p> <p><b>6</b></p> <p><b>6</b> [3] 44:9,12 80:19</p> <p><b>600</b> [7] 74:24,25 75:15 76: 12,12 97:6,7</p> <p><b>61</b> [1] 41:7</p> <p><b>68.9</b> [1] 26:6</p> <p><b>69</b> [1] 41:8</p> <p><b>7</b></p> <p><b>700</b> [6] 74:24,24,25 75:15 76:12 97:7</p> <p><b>72</b> [1] 27:24</p> <p><b>8</b></p> <p><b>80</b> [1] 25:11</p> <p><b>80,000</b> [1] 44:10</p> <p><b>800</b> [5] 74:21,22 75:15 76: 10,11</p> <p><b>82.8</b> [2] 25:20 26:2</p> <p><b>8500</b> [1] 93:6</p> <p><b>9</b></p> <p><b>9</b> [1] 79:9</p> <p><b>90</b> [1] 84:23</p> <p><b>900</b> [7] 74:21,21 75:15 76: 10 97:4,5 98:5</p> <p><b>91</b> [1] 37:14</p> <p><b>92</b> [1] 25:24</p> <p><b>93</b> [3] 25:8,9,20</p> <p><b>A</b></p> <p><b>a.m</b> [2] 1:19 4:2</p> <p><b>abandoned</b> [2] 56:23 81:3</p> <p><b>abandonment</b> [1] 80:17</p> <p><b>ability</b> [1] 95:11</p> <p><b>able</b> [5] 20:11 74:4,7 79:10 122:1</p> <p><b>above</b> [2] 20:4 23:17</p> <p><b>above-entitled</b> [1] 1:17</p> <p><b>absence</b> [6] 11:11 52:18 104:25 105:1 110:23 111: 2</p> <p><b>absent</b> [2] 30:12 56:8</p> <p><b>absentee</b> [6] 29:18,23,24 30:14,17 133:16</p> <p><b>absolute</b> [1] 76:25</p> <p><b>accept</b> [4] 16:12 31:4,5 77: 6</p> <p><b>accepted</b> [7] 39:22 57:3 62:25 63:2 81:9 86:5 90:1</p> <p><b>accomplish</b> [2] 23:8 129: 20</p> <p><b>account</b> [7] 26:6 46:21 75: 13 84:4 123:13 126:21 128:23</p> <p><b>accounted</b> [2] 38:7,8</p> <p><b>accounts</b> [1] 117:13</p> <p><b>accurate</b> [3] 79:3 91:10</p>	<p><b>133:18</b></p> <p><b>accurately</b> [1] 124:18</p> <p><b>achieve</b> [15] 5:12 14:6 56: 10 60:21 63:1 99:1 107:14 110:10,14,15 114:20 119: 15,16 121:3 122:19</p> <p><b>achieved</b> [7] 4:19 43:4 45: 6 71:19 108:7,12 109:1</p> <p><b>achieving</b> [3] 44:4 66:5 116:3</p> <p><b>acknowledge</b> [1] 99:2</p> <p><b>acknowledged</b> [7] 4:17 63:4 67:7 71:9 78:15 79: 20 94:1</p> <p><b>across</b> [2] 115:22 122:15</p> <p><b>Act</b> [3] 21:1 68:22 69:2</p> <p><b>acting</b> [1] 107:13</p> <p><b>actions</b> [1] 117:3</p> <p><b>actual</b> [6] 42:20,21 48:7 53: 16 72:7 131:16</p> <p><b>actually</b> [29] 6:24 8:3 19:13 21:5 24:14,18 25:23 33:15 37:15 38:24 39:3,16 44:21 52:19 53:19 55:17 75:20 82:24 93:18,25 99:7 113: 24 121:22 122:2 123:21 127:10 130:25 133:4 136: 3</p> <p><b>add</b> [1] 109:16</p> <p><b>addition</b> [1] 70:2</p> <p><b>additional</b> [1] 47:17</p> <p><b>address</b> [5] 24:12 124:6 133:1,10,11</p> <p><b>addressed</b> [1] 92:15</p> <p><b>addressing</b> [1] 11:17</p> <p><b>ADEN</b> [98] 2:4 3:6 56:2,3,5 58:8 59:22 60:11 61:20 62: 15,20 63:13,21 64:2,4,7,10, 16,23,25 65:11,19 66:1,3, 13,19 67:7,13 68:4,8,11,15, 24 69:17,21 70:1 71:16,21 72:5 73:5,11 74:7 75:4,18, 23 76:1,14,16 77:2 78:1,4, 14,22 79:5,8,19,22 80:5 81: 2,8,16,23 82:5,20 83:12,17 84:5 85:4,9 86:9,18,22 87: 13,16,25 88:3,10 89:1,7,15, 22 90:17 91:14 92:11,14, 20,22 93:1,23 95:9,19 96:2, 15 98:7,18 99:22 100:1,5</p> <p><b>adequate</b> [2] 7:21 14:21</p> <p><b>adequately</b> [1] 134:18</p> <p><b>administration</b> [2] 45:24 91:8</p> <p><b>admit</b> [3] 7:25 64:20 90:3</p> <p><b>admitted</b> [5] 14:20 56:23 60:19 81:3 82:12</p> <p><b>adopted</b> [1] 71:1</p> <p><b>adopting</b> [1] 5:2</p> <p><b>adult</b> [1] 24:5</p> <p><b>advanced</b> [1] 70:5</p> <p><b>affect</b> [5] 71:8 93:9 125:25</p>	<p><b>126:3,4</b></p> <p><b>affected</b> [1] 68:12</p> <p><b>affects</b> [2] 28:20 35:22</p> <p><b>affiliation</b> [6] 57:2,5 58:6 85:19 100:17 121:11</p> <p><b>affirm</b> [2] 57:8 101:22</p> <p><b>affirmed</b> [1] 105:10</p> <p><b>affords</b> [1] 117:17</p> <p><b>afraid</b> [1] 114:23</p> <p><b>African</b> [3] 42:21 54:9 82: 13</p> <p><b>ago</b> [1] 50:12</p> <p><b>agree</b> [7] 17:11 96:10 107: 16 110:21 113:25 119:18, 19</p> <p><b>agreed</b> [3] 5:19 28:24 95:1</p> <p><b>aim</b> [1] 66:18</p> <p><b>aiming</b> [1] 81:6</p> <p><b>akin</b> [1] 59:1</p> <p><b>AL</b> [2] 1:6,10</p> <p><b>ALEXANDER</b> [2] 1:3 4:4</p> <p><b>align</b> [1] 96:21</p> <p><b>aligned</b> [2] 71:12 72:1</p> <p><b>ALITO</b> [73] 12:22 13:8 20: 13 33:23,24 34:20 35:11 36:17,23 37:1,4,17 38:19 64:6,8,11,20,24 65:7,18,21 66:2,10,15,25 68:1,7,10,13 69:16 71:10,20,22 74:5,10 75:10,24 76:2,15,23 78:7,8, 19,23 79:6,15,21,23 80:13 81:5,13,21,24 82:11 83:8, 14,25 84:20 85:6 86:6,17, 20 87:9,14,19 88:1,7,18 89: 11 94:19 97:3 114:11,12</p> <p><b>allegation</b> [1] 135:13</p> <p><b>alleged</b> [3] 15:10 34:12 105:4</p> <p><b>Allen</b> [5] 8:6 40:2,11 47:20 61:13</p> <p><b>allocate</b> [1] 30:13</p> <p><b>allocated</b> [3] 29:19,25 133: 16</p> <p><b>allow</b> [2] 6:11 90:3</p> <p><b>allowed</b> [4] 91:25 92:1 126: 20 135:5</p> <p><b>alluded</b> [1] 116:12</p> <p><b>almost</b> [3] 25:8 58:19 89: 16</p> <p><b>alone</b> [3] 7:9 15:1 72:23</p> <p><b>alongside</b> [2] 63:6 92:15</p> <p><b>already</b> [3] 39:17 42:8 134: 15</p> <p><b>alternate</b> [1] 58:2</p> <p><b>alternative</b> [46] 5:5,7 8:14 10:14,20 11:9,14 12:12 13: 3 15:5,8,13 33:10,11,13 49: 2 55:13,15 57:13 58:10 59: 2,13,25 64:13,18 83:10 84: 12,19 104:10,18 106:18 107:22 108:21 109:20 110: 3 123:25 127:24,25 129:14,</p>	<p><b>17 131:11,22,25 132:2,18 133:24</b></p> <p><b>alternatively</b> [1] 65:19</p> <p><b>alternatives</b> [4] 11:23 43: 10 61:24 134:3</p> <p><b>although</b> [1] 49:22</p> <p><b>Amendment</b> [1] 114:8</p> <p><b>American</b> [2] 42:21 54:9</p> <p><b>Americans</b> [1] 82:13</p> <p><b>amici</b> [4] 58:13 86:11 94:3, 11</p> <p><b>amicus</b> [6] 2:8 3:10 15:1 82:23 100:8 119:13</p> <p><b>among</b> [3] 29:7 43:5,9</p> <p><b>amount</b> [2] 24:4 61:8</p> <p><b>analogy</b> [1] 108:3</p> <p><b>analyses</b> [7] 40:12,15 58: 19 86:11,14,23 121:24</p> <p><b>analysis</b> [38] 6:9 7:24 9:24 12:21 19:18 27:6 31:17 32: 13 34:13,21 35:25 36:9 37: 9,9 39:2,18 40:2 41:11,20, 23 42:17 47:4,19 48:2,3,5 49:3,9 51:7 58:14 76:19 87:22 106:15 114:8 125:1, 10,14 131:18</p> <p><b>anchor</b> [1] 56:25</p> <p><b>Anderson</b> [1] 126:8</p> <p><b>anew</b> [1] 82:7</p> <p><b>another</b> [10] 9:16 14:18 15: 22 23:18 50:16 53:12 93:6 102:16 105:3 114:9</p> <p><b>Ansolahehere</b> [1] 87:17</p> <p><b>answer</b> [11] 28:11,12 40:21 74:14 89:13 104:20 108: 20 109:9 111:6 113:11 129:22</p> <p><b>answered</b> [1] 40:22</p> <p><b>antitrust</b> [1] 110:12</p> <p><b>anybody</b> [1] 124:14</p> <p><b>apart</b> [2] 26:20,22</p> <p><b>apartment</b> [1] 87:21</p> <p><b>apparently</b> [1] 49:25</p> <p><b>appeal</b> [4] 6:22 7:11 77:8 101:2</p> <p><b>appeals</b> [1] 110:2</p> <p><b>APPEARANCES</b> [1] 2:1</p> <p><b>Appellants</b> [7] 1:7 2:3 3:4, 14 4:9 57:11 131:9</p> <p><b>Appellants'</b> [1] 57:22</p> <p><b>appellate</b> [1] 77:12</p> <p><b>Appellees</b> [5] 1:11 2:5 3:7 56:4 131:24</p> <p><b>appendices</b> [1] 31:22</p> <p><b>Appendix</b> [5] 7:8,9 37:11 42:23 47:9</p> <p><b>apples-to-oranges</b> [1] 36: 16</p> <p><b>application</b> [2] 94:19 98: 10</p> <p><b>applied</b> [1] 56:22</p> <p><b>apply</b> [3] 17:13 31:11 34:1</p>
--	--	--	--	---

## Official - Subject to Final Review

<p><b>approach</b> [2] 56:22 80:17  <b>apt</b> [1] 126:20  <b>area</b> [13] 11:6 27:24,25 29:7,9,12 55:12 83:2 117:18 121:3 124:21 125:4,15  <b>areas</b> [2] 22:22 54:9  <b>arguably</b> [1] 106:12  <b>argue</b> [1] 100:14  <b>arguing</b> [1] 9:15  <b>argument</b> [23] 1:18 3:2,5,8,12 4:4,8 12:23 13:4 17:11 39:24 56:3 65:24 70:13 74:14 93:2,13 98:2 99:18 100:7 120:7 131:8,10  <b>arguments</b> [5] 6:20 77:6 101:9 109:15 123:4  <b>Arlington</b> [1] 102:12  <b>around</b> [8] 25:1,7 28:5 38:21 62:4 71:3 79:16 135:5  <b>arrived</b> [2] 36:8 120:23  <b>Ash</b> [1] 73:3  <b>Ashley</b> [9] 44:8,12 73:2,3,5 83:2,6 92:9 135:15  <b>aside</b> [6] 8:6 15:13 40:12 54:25 104:7 110:18  <b>asks</b> [1] 116:22  <b>aspect</b> [1] 53:13  <b>aspects</b> [1] 37:24  <b>Assembly</b> [17] 4:13,17 5:11,20,22 8:3 15:9 17:21 25:23 30:13 133:12 134:24 135:2,5,8,23 136:7  <b>Assembly's</b> [3] 19:4 30:8 43:4  <b>assertion</b> [1] 57:22  <b>assess</b> [1] 53:21  <b>assessment</b> [1] 126:14  <b>assessments</b> [1] 118:5  <b>assignment</b> [1] 77:18  <b>Assistant</b> [1] 2:6  <b>assume</b> [5] 15:16 25:1 88:7,14 128:11  <b>assumed</b> [1] 89:12  <b>assuming</b> [2] 46:23 59:18  <b>assumption</b> [1] 97:19  <b>assumptions</b> [1] 124:18  <b>attempt</b> [2] 54:21 104:16  <b>attempts</b> [2] 101:7 124:12  <b>attorneys</b> [1] 53:19  <b>attribute</b> [1] 118:25  <b>authority</b> [1] 86:3  <b>available</b> [8] 20:16 30:17,22 51:8 84:14,16 115:19 125:4  <b>average</b> [2] 42:19 48:6  <b>avoid</b> [1] 54:21  <b>avoidance</b> [1] 80:23  <b>aware</b> [2] 114:9 135:25  <b>awareness</b> [3] 20:20 117:15 136:1  <b>away</b> [1] 39:20</p>	<p><b>back</b> [17] 10:5,23 15:16,17 17:8 19:23 21:13 29:19 30:14 66:25 83:8 101:17 103:17 106:5 107:19 113:1 134:16  <b>back-and-forth</b> [1] 61:2  <b>backed</b> [1] 96:24  <b>background</b> [2] 36:19 82:3  <b>bad</b> [2] 52:11 107:13  <b>baked</b> [1] 117:8  <b>ballot</b> [1] 30:17  <b>ballots</b> [2] 29:24 30:14  <b>bar</b> [1] 117:16  <b>Barrett</b> [13] 46:11,12 47:5 48:8,14 49:10 67:24 68:20 94:15 122:22,23 125:17 126:9  <b>based</b> [22] 4:16 9:10 16:14 40:23,25 54:2 56:12,18 65:12 69:6 75:8 94:9 105:16 111:9,23,25 116:23 117:15 134:24 135:2,3,14  <b>basic</b> [1] 56:7  <b>basically</b> [5] 17:4 20:1 21:11 120:15 125:3  <b>basis</b> [10] 34:8 60:20 62:7,8 83:4 95:7,25 105:5 112:1 114:4  <b>bear</b> [2] 100:21 123:6  <b>bears</b> [3] 107:7,25 125:23  <b>Beaufort</b> [5] 22:24 88:13 91:3,16 136:9  <b>became</b> [3] 42:12 63:9 132:11  <b>become</b> [1] 65:2  <b>behalf</b> [8] 2:2,4 3:4,7,14 4:9 56:4 131:9  <b>behavior</b> [10] 18:22,25 22:3 29:7 57:18 69:14 75:22 99:7,24 135:7  <b>behind</b> [1] 90:4  <b>believability</b> [1] 9:15  <b>believe</b> [27] 16:10 21:10,14 22:20 27:15 29:23 37:6 53:23 54:14 58:9 79:9 82:1 85:4,9,12 87:25 88:3 89:15 95:9,10,21 102:2 105:10 111:8,11 114:4 122:12  <b>believed</b> [2] 5:10 67:18  <b>below</b> [7] 6:1 8:22 32:12 39:7 71:7 77:5 125:21  <b>benchmark</b> [3] 4:15 44:23,24  <b>Berkeley</b> [5] 22:24 88:12 91:3,17 136:8  <b>besides</b> [1] 114:10  <b>best</b> [2] 30:16 123:20  <b>Bethune-Hill</b> [1] 87:18  <b>better</b> [13] 12:11 41:22 57:5 58:9 67:3,12 69:11 73:22 77:4 86:18 109:9 131:</p>	<p>20 134:2  <b>between</b> [9] 6:7 7:6 28:20 29:9 58:5 67:17 70:15 100:16 133:6  <b>beyond</b> [1] 10:11  <b>Biden</b> [16] 29:10 35:5,8 45:18 74:22,24,25 75:16 76:8,11,12,13,25 97:6,7 122:7  <b>big</b> [7] 28:5 44:5 64:22 82:20 118:3,15 119:8  <b>bill</b> [1] 55:2  <b>bit</b> [3] 41:11 48:18 72:18  <b>Black</b> [50] 24:4 25:12 26:19,23 41:3,10,15,17 46:5,25 56:18,20 59:8 62:7 63:6,10,11 71:7,7 72:24 73:13,23,23 76:19 77:16 87:1,2 88:17 90:14 91:18,18,20,22 92:3,12 93:6,19 98:2,4,15,20,21,23 121:6 128:10,20,21,22 129:3,4  <b>Blacks</b> [6] 20:2 26:7 38:14 90:12,13 92:18  <b>block</b> [1] 30:15  <b>bore</b> [1] 39:7  <b>borne</b> [1] 97:1  <b>both</b> [15] 17:23 25:4 30:13 32:13 37:2 41:13 43:2,7 47:13 53:10 78:13 87:13 109:15 128:10 135:1  <b>bothering</b> [1] 129:25  <b>bottom</b> [2] 20:10 112:22  <b>boundaries</b> [2] 45:2 132:19  <b>bounds</b> [1] 117:5  <b>boxes</b> [1] 107:22  <b>brag</b> [1] 67:4  <b>breaking</b> [1] 61:18  <b>brief</b> [14] 17:3 29:5 33:4 34:14 35:25 44:15 46:18 54:17 58:18 66:6 82:23 94:3,11 116:7  <b>briefing</b> [1] 119:9  <b>briefs</b> [4] 15:1 58:13 119:12,13  <b>Bright</b> [1] 135:9  <b>bring</b> [7] 49:22 63:3 71:5 97:12,17 109:25 129:4  <b>bringing</b> [2] 97:25 98:14  <b>broad</b> [1] 36:14  <b>brought</b> [8] 63:5,6,10 91:17 98:5 104:18,24,24  <b>building</b> [1] 87:21  <b>built</b> [1] 124:25  <b>burden</b> [17] 33:19 39:1,6 43:16 52:21 59:18,21 64:22 100:21 107:7,25 109:5 112:2 119:6 123:7 125:20,22  <b>burdens</b> [2] 48:20 117:9  <b>Bush</b> [1] 112:18  <b>but-for</b> [1] 108:6</p>	<p><b>butt</b> [1] 10:17  <b>BVAP</b> [37] 22:14,15,18 23:4,4,12,16 24:13 27:24,25 56:15 63:8 67:14,15 69:7 70:22,24 71:1,8,15 72:4 80:12 91:19 93:9 94:8 97:16,25 98:12 111:9 120:14,23 128:12,15,21 129:2,5 136:14  <b>BVAPs</b> [1] 72:23</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>call</b> [1] 19:3  <b>came</b> [4] 1:17 40:8 93:17 116:10  <b>Campsen</b> [10] 16:21 45:13,18 55:2 62:21 70:25 91:3 132:11 135:14,19  <b>Campsen's</b> [1] 45:6  <b>candidate</b> [2] 18:24 122:13  <b>candidates</b> [2] 87:1,2  <b>cannot</b> [5] 56:9 57:11 62:10 71:18 74:2  <b>CAPACITY</b> [2] 1:4 132:1  <b>careful</b> [1] 127:13  <b>CAROLINA</b> [9] 1:5,9 4:5 20:23 78:1 80:3 105:11 115:25 133:21  <b>CAROLINE</b> [3] 2:6 3:9 100:7  <b>carried</b> [2] 102:10 119:6  <b>carry</b> [3] 11:24 33:18 59:24  <b>Case</b> [88] 4:4 5:6 11:17,19 12:1,3,4,8,9,9,13,17,24 13:7,9,15 14:5 31:23 33:12,16 34:5,7,16 37:24 40:4,10,22 42:14 45:24 51:13,19 59:16 60:6,9,13 61:5 62:6 63:20,23 65:4,8,8,10 67:12 70:7 75:19 76:1 78:18 79:20 83:22 84:1 88:4 89:14 90:6 94:4 96:9 97:24 99:4,10 101:10 104:8,15 106:2,6 107:21 109:24 110:11,12 111:17 114:17,18 115:12,17 117:10 118:13 120:4 122:24 124:22 130:22,24 132:24 133:22 134:13,14,15,18 136:18,19  <b>case-specific</b> [1] 12:4  <b>cases</b> [15] 11:15 32:6 39:22 43:17 58:3 60:2 100:12 103:24 104:4 107:17 109:18 116:18 118:22 130:13 131:13  <b>cast</b> [1] 35:5  <b>categories</b> [1] 36:15  <b>caution</b> [1] 43:15  <b>CD1</b> [20] 26:7,20 56:15 57:6 59:4,8,10 62:10 63:9 69:1 74:3 81:4 88:13,16 91:19,25 92:2 94:9 120:15</p>	<p>124:24  <b>CD1's</b> [3] 56:12,24 57:24  <b>CD6</b> [1] 94:10  <b>census</b> [1] 30:15  <b>Century</b> [1] 60:19  <b>certain</b> [3] 72:2 118:25 128:18  <b>certainly</b> [3] 8:22 18:21 61:3  <b>challenge</b> [1] 72:16  <b>challenged</b> [1] 49:21  <b>challenges</b> [1] 100:17  <b>chance</b> [2] 43:22 73:4  <b>chances</b> [1] 65:25  <b>change</b> [12] 24:19 39:11 45:24 56:21 62:11,18 72:14 80:17 81:4 90:25 105:5 108:2  <b>changed</b> [1] 24:15  <b>changes</b> [4] 4:15 5:20 7:1 91:13  <b>changing</b> [2] 47:16 70:23  <b>Charleston</b> [31] 5:12,16 29:11 43:2,8,23 44:7,13,21,24 45:2,5,8,15,22 46:2,3 47:12 54:10 55:22 56:24 63:14 72:24 80:18 82:15 91:6 106:1 121:1 134:1,9,10  <b>Charlestonians</b> [5] 56:18 62:9 74:3 91:21 98:23  <b>charts</b> [1] 59:3  <b>check</b> [2] 19:22,25  <b>checks</b> [1] 107:22  <b>CHIEF</b> [48] 4:3,10 7:18 31:18 32:4,22 33:1,20 37:18 40:17 43:18 46:10 48:15 55:25 56:5 59:17,23 61:1 62:14,17 63:12,18,22 64:3 77:25 78:2,5 88:19 90:21 94:14 100:3,6,10 103:22,23 104:6,23 113:7 114:11,13 116:5 117:20 122:21 123:14 126:10 131:5 136:11,16  <b>choice</b> [1] 87:1  <b>choices</b> [4] 38:12,13 111:18 117:18  <b>chose</b> [2] 61:9 112:25  <b>chosen</b> [1] 9:8  <b>circumstance</b> [3] 82:8 98:16 113:21  <b>circumstances</b> [1] 109:21  <b>circumstantial</b> [19] 5:6 14:25 16:20 17:17,25 38:21 46:15 59:1 60:10,16 61:10,12,22 105:10 123:17 130:14 133:22,23 134:19  <b>cite</b> [3] 42:10,16 79:11  <b>cited</b> [1] 73:5  <b>citing</b> [1] 30:3  <b>claim</b> [12] 11:12 75:12 76:4 101:15,21,23 102:2,4,12,</p>
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**B**

## Official - Subject to Final Review

<p>15,21 103:20  <b>claimed</b> [2] 37:7 82:15  <b>claims</b> [5] 6:2,3,5 74:11  114:25  <b>classic</b> [1] 54:23  <b>clear</b> [64] 6:15,18,20 8:11 9:  14,17 10:6,11,24 12:16 15:  18 17:8,11 18:19 27:3,13  31:3,4,8,21 32:1,9,18 33:  24 35:13 38:18 39:5,11,11,  14 41:11 42:1,12,24 43:12  50:5,11 51:20 52:9,13 53:  1 57:7 61:3 65:2 94:18,24  95:7,8,15 96:1,5,12,14 101:  1,4 105:7 116:16,19 122:  24 123:11 125:18 126:3,18  135:17  <b>clearer</b> [1] 17:15  <b>clearly</b> [6] 11:13 28:13 42:  25 52:10 95:13 97:11  <b>client</b> [1] 85:3  <b>clients</b> [1] 28:7  <b>Close</b> [1] 64:4  <b>close-in</b> [1] 44:12  <b>closely</b> [2] 71:11,25  <b>closest</b> [1] 60:12  <b>closing</b> [2] 70:13,15  <b>clout</b> [1] 91:7  <b>Clyburn</b> [11] 45:15,16,20,  21 82:14,18,22,22 83:5 91:  5 94:10  <b>Clyburn's</b> [5] 46:1 83:1 91:  7 93:18 94:3  <b>coastal</b> [1] 45:5  <b>coincidence</b> [2] 62:5 80:  11  <b>collapsed</b> [1] 102:16  <b>colloquy</b> [1] 71:4  <b>combination</b> [1] 60:7  <b>come</b> [14] 38:18 39:20 53:  16 60:12 66:25 83:8 89:24  90:14 91:25 114:24 116:9  117:25 118:17 133:20  <b>comes</b> [1] 23:18  <b>coming</b> [2] 123:19 127:21  <b>commerce</b> [1] 45:4  <b>Commission</b> [2] 70:6 133:  15  <b>committed</b> [7] 7:14 8:9 32:  19 36:12 40:9,11 57:12  <b>commonality</b> [1] 26:21  <b>communities</b> [2] 135:3,6  <b>community</b> [1] 73:6  <b>compactness</b> [2] 46:22  124:5  <b>comparable</b> [2] 58:9 64:  18  <b>compared</b> [2] 42:21 44:23  <b>comparison</b> [1] 36:16  <b>compelling</b> [1] 56:8  <b>completely</b> [6] 30:2 42:13  79:12 105:12 114:19 134:</p>	<p>25  <b>compliance</b> [5] 23:6 44:22  68:21 104:17 113:16  <b>compliant</b> [2] 65:5 132:8  <b>complicated</b> [1] 109:18  <b>complication</b> [1] 109:17  <b>complied</b> [2] 43:6 133:25  <b>complies</b> [2] 55:23 74:8  <b>complimentary</b> [2] 78:24  79:6  <b>comply</b> [2] 13:25 69:1  <b>composition</b> [10] 21:21,22,  24 35:20,22 44:17,18 59:5,  6 64:15  <b>compositions</b> [1] 34:24  <b>computer</b> [4] 15:2 18:10,  11 19:24  <b>computers</b> [2] 18:19 109:  3  <b>concedes</b> [1] 29:5  <b>concerned</b> [4] 8:24 13:16  50:3 78:9  <b>concerning</b> [1] 24:4  <b>concerns</b> [2] 36:18 48:19  <b>concise</b> [1] 123:16  <b>concluded</b> [4] 7:4 36:5 56:  11 118:9  <b>conclusion</b> [4] 36:9 116:  10 118:1 120:5  <b>conclusions</b> [3] 6:23 61:  24 130:17  <b>conduct</b> [2] 17:1 31:15  <b>conducted</b> [1] 12:21  <b>conducting</b> [1] 16:17  <b>CONFERENCE</b> [2] 1:10 4:  5  <b>configured</b> [1] 61:7  <b>confirms</b> [1] 4:22  <b>confronted</b> [3] 84:6 93:2,  12  <b>Congress</b> [2] 45:17 91:8  <b>congressional</b> [5] 30:5,21,  22 80:19 115:21  <b>Congressman</b> [5] 45:16,  20,21 46:1 82:18  <b>connection</b> [3] 67:17 70:  14 99:14  <b>consciousness</b> [2] 80:6  117:16  <b>consider</b> [8] 8:7 26:12 36:  10,11,13 40:14 50:24 124:  14  <b>consideration</b> [3] 11:5 20:  21 113:22  <b>considerations</b> [1] 124:25  <b>considered</b> [4] 52:7 83:16  93:12,13  <b>consistency</b> [3] 24:1,9 70:  22  <b>consistent</b> [6] 47:22 77:9,  9 82:21 88:24 94:23  <b>consistently</b> [3] 67:21 70:</p>	<p>10 71:15  <b>constant</b> [1] 23:1  <b>constituencies</b> [1] 80:22  <b>constituted</b> [1] 124:24  <b>Constitution</b> [1] 92:6  <b>constitutional</b> [2] 4:15 72:  16  <b>constitutionally</b> [3] 58:6  81:12 90:19  <b>consultant</b> [2] 29:23 69:13  <b>contains</b> [1] 134:10  <b>contention</b> [1] 128:1  <b>context</b> [5] 14:19 15:4 94:  19 114:7,10  <b>contexts</b> [1] 14:15  <b>contiguity</b> [6] 7:20 48:1 49:  9 134:5,7,12  <b>contiguous</b> [5] 47:1 105:  23 134:8,8,9  <b>contiguoussness</b> [2] 46:  22 124:5  <b>continue</b> [1] 40:18  <b>continues</b> [1] 22:19  <b>contradict</b> [2] 6:23 101:10  <b>contradictory</b> [1] 51:10  <b>contradicts</b> [1] 36:1  <b>contrary</b> [2] 22:7 36:8  <b>contrast</b> [2] 57:21 59:9  <b>contributed</b> [1] 129:9  <b>control</b> [10] 7:15,17 8:1,14  34:18 47:7,25 86:7,21 124:  4  <b>controlled</b> [3] 8:25 41:23  76:22  <b>controlling</b> [3] 26:8 37:7  76:18  <b>controls</b> [1] 76:17  <b>conviction</b> [1] 32:11  <b>Cooper</b> [30] 11:2,16 12:19  13:7,9,9 15:18 16:18 17:  14,15 48:4 50:10,24 57:3  58:15,17 77:10 79:22 81:  10 86:12,14 87:18 95:12  106:12,14 107:18 112:17  118:23 125:2 126:2  <b>Cooper's</b> [1] 56:7  <b>core</b> [4] 25:9 26:2 81:3 129:  22  <b>correct</b> [32] 12:19 21:8 31:  11 34:17,19 36:20,22,25  37:5 47:3 49:1 50:1 54:11  78:20 81:2 82:10 83:12 87:  13 88:25 89:1,6,7 90:16  92:22 93:1 98:8,18 103:1,  16 112:2 113:2 131:19  <b>correctly</b> [5] 16:23,25 22:9  46:20 63:19  <b>correlating</b> [1] 97:22  <b>correlation</b> [8] 6:7 7:6 28:  19 36:6 58:5 100:16 120:  19 133:6  <b>correlations</b> [1] 22:6</p>	<p><b>corroborate</b> [1] 86:13  <b>corroborated</b> [2] 58:12 69:  10  <b>couldn't</b> [6] 90:11 91:12  103:12 113:12 114:21 120:  10  <b>Counsel</b> [20] 28:1,3 33:21  56:1 58:1 59:17 65:14 66:  21 68:21 70:14 73:2 78:3  100:4 106:17 113:8 128:5  131:6 132:4,16 136:17  <b>counter</b> [1] 85:20  <b>counties</b> [9] 63:4,5 71:6  80:23 88:15 91:3 124:23  125:12 136:9  <b>County</b> [46] 5:12,16 15:23  22:24 26:21 27:23,24 29:  11 43:3,8,23 44:7,21,25 45:  2,4,8,15,22 46:2,3 47:4,12,  12 49:9 55:23 56:24 62:10  63:14 80:18 82:15 87:12,  21 88:4,11,12,12 91:6 106:  1 121:1 124:20 125:9 133:  17 134:2,9,10  <b>country's</b> [1] 45:9  <b>couple</b> [2] 50:22 108:18  <b>course</b> [7] 14:14 44:3 45:  20 58:3 92:8 104:3 105:25  <b>COURT</b> [174] 1:1,18 4:11 6:  10,15,19 8:6,10 9:18,21 10:  22 11:3 12:15 15:25 16:10,  12,18 17:12,13,16 18:5 20:  20 21:7,13,23 23:10 24:8  26:1 27:2,12,15,21 32:10,  16,17 33:6 34:4,5 38:3 39:  3,8,15,16 40:2,8,11 42:15  47:20 48:3,10,13,23 49:17,  19,20,25 50:13,24 51:1,4,  11 52:5,7,8,9,16,22 53:14,  18 54:1,3,5,7 56:6 57:2,8,  17 58:23 59:13 61:9,23 62:  25 63:2,4 67:7 69:3 70:20  71:5,17 72:7 73:6,14 74:2  77:5,12 79:16,20 80:16 81:  8,10,16 82:6,10,25 83:23  84:5 86:5,8,9 89:23 90:1  91:15,15 92:15,20 93:2,11,  14 94:1,21 95:5,11,14,21  96:6,16,19 98:24 99:5 100:  11,12,24 101:1,6,21 102:1,  3,8,13,25,25 103:3,14,16,  18,19 104:5 105:9,12,14,  16,20 107:18 112:16 113:4  116:1,9,18 117:24 118:4,  10,23 119:20 121:3,8 122:  17 123:11 127:7,14,18,20  133:2,4 134:6  <b>Court's</b> [27] 5:1 6:1,13 21:  19 27:5 28:6 31:3 32:13  39:17 50:8,19 53:6,11,21  57:25 63:15 101:2,12 107:  1 116:23 120:5 123:1 126:</p>	<p>7,19,24 129:9 136:6  <b>courts</b> [6] 6:5 54:19 86:2  100:18 117:3 119:3  <b>covered</b> [1] 29:8  <b>Covington</b> [2] 105:11 134:  13  <b>create</b> [1] 126:5  <b>created</b> [2] 27:23 112:23  <b>creating</b> [1] 109:13  <b>creator</b> [1] 65:16  <b>credibility</b> [13] 9:16 16:8,  14 21:10 53:12 54:1,15,20,  23 77:11 95:10 118:16  121:9  <b>credit</b> [7] 10:2 42:2,4 50:18  61:9 94:22 96:17  <b>credited</b> [7] 6:16 16:15 48:  3 54:3 57:3 72:7 125:3  <b>crediting</b> [2] 50:8 52:23  <b>criteria</b> [6] 4:16 83:18,20  88:24 89:5 124:11  <b>critical</b> [2] 38:20 83:3  <b>Cromartie</b> [24] 8:10 11:20  12:3 27:20,20,22 32:17,17  39:4,8,18 51:5,6,15,25 52:  1,12 57:16 61:21 75:19 99:  4  <b>cross-examination</b> [2] 8:  1 42:13  <b>crossover</b> [1] 29:3  <b>crucial</b> [1] 34:16  <b>curiae</b> [3] 2:8 3:11 100:8  <b>curiosity</b> [1] 113:11  <b>cut</b> [1] 46:24</p>
--	--	---	---	---

## D

**D.C** [4] 1:14 2:2,7 45:10  
**Dagusa** [1] 84:13  
**damning** [1] 80:4  
**dancing** [1] 28:5  
**data** [113] 4:23,23 5:24 6:23  
7:2 14:21 18:12,13,17,20  
19:5,6,8,15 20:8 21:3,6,12,  
15 22:1,3,12 23:13,15 28:8,  
9,9,16,17,18,22,23,25 29:6,  
17,25 30:6,9,11,12,16,16,  
18,24 31:5 36:1,2 37:8,13  
42:9,14 57:23 60:3,5,24,25  
67:17,18,20 68:9,10,16,23  
69:7,7,8,8,12,20,24 70:2,4,  
5,8 75:8,20,21 76:21 85:1  
97:1 99:8,11,13,14,18,20  
104:11 111:10 115:5,19  
119:10,15,24 120:1,2,3,9,  
10,11 121:14 126:15 127:9,  
15 133:2,3,5,5,7,9,13,19,  
19,19  
**Daubert** [1] 58:22  
**day** [2] 11:24 128:16  
**days** [1] 109:4  
**de** [3] 50:4,9 127:3  
**dealing** [1] 42:2  
**dealt** [1] 102:18

## Official - Subject to Final Review

<p><b>decades</b> <sup>[1]</sup> 78:15</p> <p><b>decide</b> <sup>[1]</sup> 85:1</p> <p><b>decided</b> <sup>[1]</sup> 50:14</p> <p><b>decision</b> <sup>[5]</sup> 5:25 15:24 85:13 103:17 120:25</p> <p><b>decisionmakers</b> <sup>[1]</sup> 94:1</p> <p><b>decisionmaking</b> <sup>[1]</sup> 129:23</p> <p><b>decisions</b> <sup>[7]</sup> 8:3 9:10 47:21,23 100:23 103:10 104:22</p> <p><b>declared</b> <sup>[1]</sup> 4:25</p> <p><b>deep</b> <sup>[1]</sup> 125:9</p> <p><b>Deer</b> <sup>[1]</sup> 93:4</p> <p><b>defeat</b> <sup>[1]</sup> 39:24</p> <p><b>defend</b> <sup>[1]</sup> 65:23</p> <p><b>defendant</b> <sup>[2]</sup> 70:7 110:9</p> <p><b>defendant's</b> <sup>[1]</sup> 129:20</p> <p><b>defendants</b> <sup>[4]</sup> 58:18 100:13 109:19 120:21</p> <p><b>Defendants'</b> <sup>[1]</sup> 101:9</p> <p><b>defended</b> <sup>[1]</sup> 65:5</p> <p><b>defending</b> <sup>[1]</sup> 72:13</p> <p><b>defense</b> <sup>[1]</sup> 20:24 21:6 52:6,18 68:25 82:21 84:20 89:13,14 101:5 118:24</p> <p><b>defensible</b> <sup>[1]</sup> 79:25</p> <p><b>deference</b> <sup>[6]</sup> 77:11 95:14 122:25 126:18 127:7,11</p> <p><b>deferential</b> <sup>[1]</sup> 50:12</p> <p><b>deferred</b> <sup>[1]</sup> 9:18</p> <p><b>defined</b> <sup>[1]</sup> 135:6</p> <p><b>definite</b> <sup>[1]</sup> 32:11</p> <p><b>definition</b> <sup>[2]</sup> 43:12,13</p> <p><b>degrees</b> <sup>[1]</sup> 32:23</p> <p><b>demanding</b> <sup>[4]</sup> 34:1 39:1,6 43:16</p> <p><b>demeanor</b> <sup>[3]</sup> 16:14 54:2,18</p> <p><b>Democrat</b> <sup>[3]</sup> 73:23 90:13 135:10</p> <p><b>Democratic</b> <sup>[7]</sup> 33:15 42:19 44:13 90:13 92:10 132:3,15</p> <p><b>democratic-leaning</b> <sup>[1]</sup> 128:19</p> <p><b>Democrats</b> <sup>[19]</sup> 4:21,24 26:8 27:1 37:2 41:3,5,8,10,15,16,17 45:17 78:13 84:22 91:25 128:23 129:4,4</p> <p><b>demographic</b> <sup>[2]</sup> 25:10 105:16</p> <p><b>demographics</b> <sup>[3]</sup> 20:15,17 80:3</p> <p><b>demonstrate</b> <sup>[2]</sup> 69:10 80:9</p> <p><b>demonstrated</b> <sup>[1]</sup> 6:24</p> <p><b>demonstrates</b> <sup>[3]</sup> 31:10 85:22 130:24</p> <p><b>denial</b> <sup>[1]</sup> 80:7</p> <p><b>denials</b> <sup>[1]</sup> 79:13</p> <p><b>denied</b> <sup>[1]</sup> 78:17</p>	<p><b>denying</b> <sup>[1]</sup> 105:13</p> <p><b>departing</b> <sup>[2]</sup> 5:1 43:14</p> <p><b>Department</b> <sup>[2]</sup> 2:7 72:15</p> <p><b>depend</b> <sup>[2]</sup> 23:2,5</p> <p><b>depends</b> <sup>[1]</sup> 25:21</p> <p><b>deposition</b> <sup>[1]</sup> 135:18</p> <p><b>describe</b> <sup>[1]</sup> 118:25</p> <p><b>description</b> <sup>[1]</sup> 136:6</p> <p><b>Desert</b> <sup>[1]</sup> 59:14</p> <p><b>design</b> <sup>[5]</sup> 56:12 57:6,24 83:24 92:3</p> <p><b>designed</b> <sup>[1]</sup> 57:17</p> <p><b>desired</b> <sup>[1]</sup> 105:6</p> <p><b>despite</b> <sup>[2]</sup> 70:22 80:7</p> <p><b>detail</b> <sup>[2]</sup> 88:6 98:19</p> <p><b>detailed</b> <sup>[2]</sup> 91:16 94:11</p> <p><b>details</b> <sup>[1]</sup> 98:24</p> <p><b>determination</b> <sup>[8]</sup> 53:22 54:1,16,17,24 103:17 126:19 127:8</p> <p><b>determinations</b> <sup>[3]</sup> 31:24 54:21 95:11</p> <p><b>determine</b> <sup>[3]</sup> 61:13 103:12 127:19</p> <p><b>determined</b> <sup>[5]</sup> 32:18 57:17 87:2 93:24 134:17</p> <p><b>determines</b> <sup>[3]</sup> 59:6 76:19 77:11</p> <p><b>determining</b> <sup>[2]</sup> 35:1,17</p> <p><b>dictates</b> <sup>[1]</sup> 113:24</p> <p><b>different</b> <sup>[25]</sup> 7:21 8:15 9:1 13:9 18:2 20:10 31:24 32:23 35:18 47:11 48:2 64:14 85:15 90:15 95:3 102:11 103:4 107:15 109:2 118:17 124:13 129:17,19 130:14 132:24</p> <p><b>differently</b> <sup>[2]</sup> 50:14 118:17</p> <p><b>difficult</b> <sup>[3]</sup> 59:20 118:22 122:24</p> <p><b>dilute</b> <sup>[1]</sup> 103:7</p> <p><b>dilution</b> <sup>[7]</sup> 101:15 102:12,15,18,21 103:6 104:2</p> <p><b>direct</b> <sup>[44]</sup> 4:22 6:6 9:6,8,9 11:17,21 12:25,25 13:10,14,18,23 14:16 15:20 16:2,19 17:17,24 19:10 28:16 33:6,7 42:6 43:2 45:14 54:5 55:1,10 59:25 60:15,18 61:6 104:9,16,25 109:22,24 130:15,21,22 131:1 133:8,24</p> <p><b>directed</b> <sup>[2]</sup> 11:16 15:25</p> <p><b>direction</b> <sup>[1]</sup> 86:16</p> <p><b>directions</b> <sup>[1]</sup> 25:5</p> <p><b>directly</b> <sup>[4]</sup> 53:18 114:22 115:4,8</p> <p><b>disagree</b> <sup>[9]</sup> 9:25 19:1 50:7 54:14 61:20 95:24 96:20 119:23 127:4</p> <p><b>disagreed</b> <sup>[5]</sup> 49:19,25 53:</p>	<p>22 54:7 95:1</p> <p><b>disagreement</b> <sup>[1]</sup> 50:19</p> <p><b>disappears</b> <sup>[1]</sup> 41:25</p> <p><b>disbelieve</b> <sup>[1]</sup> 27:15</p> <p><b>disclaim</b> <sup>[2]</sup> 62:22 100:13</p> <p><b>disclaimed</b> <sup>[4]</sup> 16:7 67:10 69:2 135:12</p> <p><b>disclaiming</b> <sup>[3]</sup> 66:7,22 68:19</p> <p><b>discount</b> <sup>[1]</sup> 38:4</p> <p><b>discovery</b> <sup>[7]</sup> 58:21 65:4 66:11,12,16,17 135:17</p> <p><b>discriminate</b> <sup>[1]</sup> 101:14</p> <p><b>discrimination</b> <sup>[4]</sup> 104:9,25 131:14 132:23</p> <p><b>discriminatory</b> <sup>[1]</sup> 132:21</p> <p><b>discuss</b> <sup>[2]</sup> 16:4 54:5</p> <p><b>discussed</b> <sup>[2]</sup> 55:19 115:17</p> <p><b>discussing</b> <sup>[3]</sup> 49:10 118:6 122:11</p> <p><b>discussion</b> <sup>[2]</sup> 35:15 135:24</p> <p><b>disentangle</b> <sup>[12]</sup> 5:7 13:2 15:24 33:13 58:7 84:10 100:21 117:11 123:8,21 124:12 125:23</p> <p><b>disentangled</b> <sup>[4]</sup> 17:19 33:18 55:14 131:22</p> <p><b>disentanglement</b> <sup>[1]</sup> 40:16</p> <p><b>disentangling</b> <sup>[9]</sup> 46:16 57:1 58:25 59:19 65:9 84:1 85:17 87:7 96:25</p> <p><b>disparate</b> <sup>[1]</sup> 26:10</p> <p><b>disparities</b> <sup>[2]</sup> 100:15 121:5</p> <p><b>disproportionately</b> <sup>[1]</sup> 73:24</p> <p><b>disproves</b> <sup>[1]</sup> 136:7</p> <p><b>dispute</b> <sup>[1]</sup> 63:2</p> <p><b>disputes</b> <sup>[2]</sup> 56:7 131:14</p> <p><b>disregard</b> <sup>[1]</sup> 77:19</p> <p><b>disregarded</b> <sup>[1]</sup> 56:21</p> <p><b>disregarding</b> <sup>[1]</sup> 71:24</p> <p><b>dissimilar</b> <sup>[2]</sup> 36:15,16</p> <p><b>distinction</b> <sup>[1]</sup> 95:24</p> <p><b>distinction's</b> <sup>[1]</sup> 13:17</p> <p><b>distorts</b> <sup>[1]</sup> 18:24</p> <p><b>District</b> <sup>[182]</sup> 4:12,14,18,20,21,25 5:17,21 6:15 7:1,4,7,16,17 8:8 9:18 13:22 14:1,15 17:12,13,16 20:3 21:19,23 22:19 24:3 25:8,9 26:1,3,12 27:5,14,25 28:6 29:8,10 32:13 33:6,14,15 34:4 35:23 36:7 38:3 39:16 41:4,9,18 42:15 43:8 44:4,8,9,16 48:9,13,23 49:17,19,19,25 50:8,19 51:1,8,11,16 52:5,9,16,22 53:5,11,14 54:19</p>	<p>57:18 61:9 62:19 63:25 65:17,25 71:8 72:2,3 74:2,16,19,20 75:3,17 76:10 77:5 79:16 80:19 81:7 83:22 84:5,22 86:7 88:2 91:12 92:4,24 93:10,19 94:6,21 95:4,21 96:6 97:5,7,12,18,21,25 98:5 100:24 102:3,8,25 103:3 105:6,15,17,19,23,24 106:10 111:11 113:3,19,23 116:1,9,23 117:24 118:4,10 119:1,3,20 120:5,17 121:3,8 122:17 123:1,10 126:19,23 127:5,7,14,20 128:1,8,9,18,24 129:9 131:24 132:2,3,14,15 133:2,4 134:2,6,7 136:6,14</p> <p><b>district-wide</b> <sup>[7]</sup> 5:13 25:15,18,24 43:3,9 44:5</p> <p><b>districting</b> <sup>[10]</sup> 23:7 36:10 43:7 44:22 80:20 106:2 117:18 124:11 132:9 134:1</p> <p><b>districts</b> <sup>[12]</sup> 7:21 22:13 35:6 38:15 60:1 61:7,15 94:7 104:10 105:1 113:12 122:2</p> <p><b>divide</b> <sup>[1]</sup> 106:1</p> <p><b>divisions</b> <sup>[1]</sup> 80:22</p> <p><b>Doctor</b> <sup>[2]</sup> 67:1 86:17</p> <p><b>documents</b> <sup>[2]</sup> 72:7 135:21</p> <p><b>doing</b> <sup>[1]</sup> 18:4,6 20:1 38:18 56:17 67:5,10 78:17 107:9 108:10 114:20</p> <p><b>done</b> <sup>[13]</sup> 41:14 44:2 47:19 48:3 64:21 65:24 93:25 100:25 104:13 105:4 108:23,23 132:21</p> <p><b>Dorchester</b> <sup>[2]</sup> 47:13 91:17</p> <p><b>down</b> <sup>[6]</sup> 20:10 30:15 48:18 53:13 129:5 133:16</p> <p><b>draft</b> <sup>[2]</sup> 24:13 46:1</p> <p><b>drafting</b> <sup>[1]</sup> 24:14</p> <p><b>draw</b> <sup>[18]</sup> 18:15 19:13,24 31:6 47:11 69:1 85:21 91:12 113:12,18,22 125:5,16 131:21 135:2,3,5 136:3</p> <p><b>drawer</b> <sup>[8]</sup> 9:7 14:19 20:9,15 21:20 23:8 30:23 53:20</p> <p><b>drawers</b> <sup>[4]</sup> 18:10,11 30:24 56:14</p> <p><b>drawing</b> <sup>[11]</sup> 30:4 56:9 61:15 67:23 78:16 80:18 99:20 100:14 120:25 132:12 134:24</p> <p><b>drawings</b> <sup>[2]</sup> 15:2 120:24</p> <p><b>drawn</b> <sup>[12]</sup> 15:8 26:13 64:12 78:13 96:18 109:10 113:25 124:23 129:18 130:17 134:9 135:14</p>	<p><b>draws</b> <sup>[1]</sup> 37:1</p> <p><b>drew</b> <sup>[6]</sup> 16:6 17:23 53:16 94:5,7 125:13</p> <p><b>drill</b> <sup>[1]</sup> 48:17</p> <p><b>driving</b> <sup>[5]</sup> 99:19 104:21 106:10 128:6 129:22</p> <p><b>drop</b> <sup>[1]</sup> 98:1</p> <p><b>drove</b> <sup>[1]</sup> 100:22</p> <p><b>Duchin</b> <sup>[5]</sup> 28:24,25 40:4 85:20 86:21</p> <p><b>Duchin's</b> <sup>[2]</sup> 83:21 85:23</p> <p><b>durability</b> <sup>[1]</sup> 115:22</p> <p><b>durable</b> <sup>[1]</sup> 116:3</p> <p><b>during</b> <sup>[8]</sup> 58:21,22 62:23 66:14 70:18 89:17,21 90:9</p> <p><b>dynamic</b> <sup>[3]</sup> 129:25 130:4,8</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>e-mails</b> <sup>[1]</sup> 135:20</p> <p><b>each</b> <sup>[7]</sup> 7:13 20:2,3 37:20 48:7 85:15 95:1</p> <p><b>earlier</b> <sup>[3]</sup> 78:9 115:17 119:24</p> <p><b>easier</b> <sup>[2]</sup> 111:1,16</p> <p><b>easiest</b> <sup>[2]</sup> 8:19 111:16</p> <p><b>easily</b> <sup>[2]</sup> 6:11 44:19</p> <p><b>easy</b> <sup>[1]</sup> 131:21</p> <p><b>effect</b> <sup>[6]</sup> 15:11 35:17 41:25 64:14 93:2 106:16</p> <p><b>effective</b> <sup>[1]</sup> 29:15</p> <p><b>effectively</b> <sup>[1]</sup> 28:19</p> <p><b>effects</b> <sup>[4]</sup> 27:3,11,18,20</p> <p><b>either</b> <sup>[2]</sup> 35:21 58:21</p> <p><b>election</b> <sup>[40]</sup> 14:21 18:12,17,23 19:4,5,6,8 22:8,12 23:13,15,18 28:18,20,23 29:1,16,17 30:6,9,12,20,21,22,24 111:10 115:5,21 121:14,20,21 122:9 126:15 127:6 133:2,3,13,15,19</p> <p><b>Elections</b> <sup>[3]</sup> 70:6 115:23 121:25</p> <p><b>electoral</b> <sup>[3]</sup> 5:18 69:20,24</p> <p><b>elsewhere</b> <sup>[2]</sup> 47:15 98:3</p> <p><b>embedded</b> <sup>[3]</sup> 7:24 9:23 20:8</p> <p><b>emerged</b> <sup>[1]</sup> 93:20</p> <p><b>employed</b> <sup>[2]</sup> 36:21,23</p> <p><b>enacted</b> <sup>[16]</sup> 6:25 24:17 37:9,14 44:6,25 45:1 46:9 65:4 87:3 131:20 132:8,10,12 134:7 135:10</p> <p><b>end</b> <sup>[7]</sup> 9:13 19:23 116:4 119:16 128:16 136:10,13</p> <p><b>ended</b> <sup>[1]</sup> 46:8</p> <p><b>ends</b> <sup>[2]</sup> 71:21 110:10</p> <p><b>enforce</b> <sup>[2]</sup> 5:4 10:14</p> <p><b>enforcement</b> <sup>[1]</sup> 104:1</p> <p><b>enough</b> <sup>[6]</sup> 12:14 28:10 64:4 79:4 119:15 127:9</p> <p><b>ensemble</b> <sup>[1]</sup> 40:15</p> <p><b>ensure</b> <sup>[4]</sup> 17:18 39:15 52:</p>
---	---	--	--	---

## Official - Subject to Final Review

<p>9 68:21  <b>ensures</b> [2] 131:12,15  <b>ensuring</b> [1] 74:16  <b>entire</b> [3] 19:9 33:2 50:25  <b>entirely</b> [4] 9:1 34:10 71:24 89:16  <b>entirety</b> [4] 73:8 116:24 119:4 125:11  <b>envelope</b> [7] 47:4 49:9 87:12,21 88:4,11 124:20  <b>environment</b> [1] 130:25  <b>equal</b> [3] 11:6 59:16 74:18  <b>equally</b> [1] 50:16  <b>erroneous</b> [4] 5:2 28:13 42:25 52:10  <b>error</b> [65] 6:15,18,20 8:5,9,12 9:14,17 10:6,7,13 12:16 15:22 16:23 17:3,8,11 21:19 23:24 27:13 31:3,4,8,11,21 32:1,9,11,19 33:24 36:12 38:18 39:5,11,14 40:9 42:1,11,24 43:12 50:5,11 52:9,14 53:1 57:7,12 61:3 94:18,24 95:7,8,15 96:1,5,14 101:4 116:16,19 122:25 123:5,11 125:19 126:4,18  <b>errors</b> [11] 7:15 10:9,11,11 12:20 15:21 17:4,7 32:13 33:5 40:10  <b>especially</b> [1] 100:18  <b>espouse</b> [1] 67:25  <b>ESQ</b> [4] 3:3,6,9,13  <b>ESQUIRE</b> [2] 2:2,4  <b>essentially</b> [4] 41:13 46:23 87:4 124:21  <b>establish</b> [3] 7:10 32:14 129:12  <b>established</b> [2] 19:11 43:3  <b>establishing</b> [1] 135:22  <b>ET</b> [2] 1:6,10  <b>evaluate</b> [3] 94:25 102:4 103:2  <b>evaluated</b> [1] 84:21  <b>evaluating</b> [1] 31:21  <b>even</b> [42] 5:19 7:13 12:18 14:16 16:4 26:24,25 29:11 30:19 32:9 33:9,11 35:14 38:11 39:23 40:13 42:7,10,16 50:16 54:5,22,25 56:9 63:16 66:9,9 70:23 72:6 92:1 94:2 98:11 101:5 107:21 109:16,17 110:4 120:15 121:7 130:2 135:4,12  <b>events</b> [1] 16:13  <b>everybody</b> [3] 18:14 97:19 106:21  <b>everyone</b> [2] 28:17 108:13  <b>everything</b> [1] 90:8  <b>evidence</b> [128] 4:22 6:6 9:8,9 11:18,21,23 12:2,5,6,7,10,25,25 13:10,14,18,19,20,24 14:2,16,25 15:20 16:</p>	<p>2,16,19,24 17:5,18 18:3,3,5 19:11,12,16,17,21 20:7,7 21:20 23:10 28:17 33:6,8,16 38:21 39:2,17 42:6 43:2,22 46:15 51:1,2,10 53:15 54:4,4 55:10 58:24 59:1,25 60:10,15,16,18 61:6,8,11,12,22 64:17 68:2 70:21 72:8 73:21 77:17,21 80:8 85:22 90:11 104:9,16,20 105:3 106:6 107:17 108:11,20 109:11,15,22,24 110:17,22 114:4 115:18,24 116:21,24 118:3,11,15 119:5,20 121:10,19 122:10,16 123:16 124:1,3,16 126:22 127:19 128:17 129:8 130:12,21,22 131:1,16 133:8,23,24 134:20  <b>evidentiary</b> [5] 11:4,10 55:16 101:7 117:25  <b>exact</b> [7] 40:10,21 42:3 80:11 116:10 117:24 120:23  <b>exacting</b> [1] 6:11  <b>exactly</b> [12] 13:6 32:16 38:1 39:3 40:9 51:5 52:4 53:1 82:17 93:11 98:24 135:7  <b>examined</b> [1] 34:11  <b>example</b> [3] 27:22 96:6 130:1  <b>exceedingly</b> [1] 123:7  <b>except</b> [1] 13:2  <b>excluded</b> [4] 41:3,17 51:11 52:6  <b>excuse</b> [1] 14:8  <b>exist</b> [2] 10:21 13:20  <b>expect</b> [1] 97:25  <b>expectation</b> [1] 70:11  <b>expelling</b> [1] 63:13  <b>experience</b> [1] 78:15  <b>expert</b> [57] 6:8,16 8:9,13 9:16 28:24 29:21,22 34:10,15 37:21,23 38:10 39:18,23 42:25 46:13 47:23 48:24 49:6,20,22 51:6,9,11 52:6,6,11,19 53:23 57:4 73:21 77:8,16 81:19 84:3,20 85:9,13,15 86:4 104:19 106:6,7,14 108:19 109:10 118:2,11,15 121:10 123:20,25 125:2 130:5,11 131:17  <b>expertise</b> [2] 49:21 53:11  <b>experts</b> [25] 6:17 8:5 9:21 34:17 38:5,7,22 39:21 40:3,8,20 41:13 42:2,5,8 49:1 52:5 64:9 69:5 80:9 83:9 90:8 111:5,23 124:10  <b>explain</b> [12] 9:7 23:25 24:9 35:11 45:12 62:4 74:2,4,8 90:11 111:24 130:6  <b>explained</b> [6] 8:2 31:9 44:20 45:18 62:11 112:1</p>	<p><b>explaining</b> [2] 9:4 77:17  <b>explains</b> [4] 25:9 109:9 121:11 131:20  <b>explanation</b> [7] 17:22 80:16 81:1,14 95:22,23 116:13  <b>explanations</b> [1] 24:10  <b>explore</b> [1] 106:18  <b>exploring</b> [1] 108:4  <b>extensive</b> [1] 66:11  <b>extensively</b> [1] 68:3  <b>extent</b> [5] 13:16 17:10 28:21 50:6,18  <b>extraordinary</b> [1] 43:15</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>face</b> [1] 43:16  <b>fact</b> [32] 10:2 19:5 20:14 26:6 30:10 33:7 54:20 62:1,5 66:24 67:5 69:5 70:21,22 71:12 72:10 77:10 81:2 82:10 88:11 95:3,24 105:18 115:7 120:14 123:6,11 126:17 127:4,5 129:24 132:11  <b>factor</b> [2] 38:19 83:24  <b>factored</b> [1] 68:8  <b>factors</b> [4] 23:6 29:4 46:21 124:4  <b>facts</b> [6] 7:9 10:10 23:10 32:24 96:22 126:1  <b>factual</b> [16] 17:3,7 31:24 32:7,14 33:5 56:13 57:8,9 60:23 69:15 101:4 110:7 123:3,12 126:6  <b>fail</b> [1] 33:13  <b>failed</b> [12] 5:4 15:24 17:12,23 33:18 34:18 37:21,22 40:13 80:15 99:5 131:24  <b>failing</b> [2] 21:19 31:11  <b>failure</b> [3] 8:7 10:14 31:15  <b>fair</b> [2] 86:25 88:14  <b>fairly</b> [1] 120:3  <b>faith</b> [8] 17:21 43:14 107:13 108:17 117:1,8 123:9 125:21  <b>faithful</b> [1] 86:14  <b>faithfully</b> [1] 82:16  <b>fall</b> [1] 120:6  <b>far</b> [5] 7:19 27:19 41:4,18 133:9  <b>favor</b> [3] 34:8 60:4 71:14  <b>favorable</b> [1] 85:2  <b>favoring</b> [2] 22:13,22  <b>few</b> [1] 24:10  <b>fewer</b> [1] 76:13  <b>Fifick</b> [1] 66:20  <b>Figure</b> [3] 59:3 84:12 119:5  <b>figures</b> [1] 44:14  <b>figuring</b> [2] 122:6 125:15  <b>final</b> [1] 55:7  <b>Finally</b> [1] 57:15  <b>find</b> [13] 40:1 54:12 101:13,</p>	<p>17,17,25 105:16,21 116:1,12 117:14 119:21 133:2  <b>finder</b> [1] 10:2  <b>finding</b> [27] 8:11 16:14 23:20 27:21 28:7 32:20 42:3 50:15 53:6,7 54:13 57:9 60:24 82:10 93:15 95:15,15,25 96:24 101:4 126:17,24 127:14 129:9 131:15 134:6,20  <b>findings</b> [22] 9:17 32:7 34:4,6 53:12 54:20 56:13 69:15 77:10 84:7 91:15 95:2,16,18 96:7 102:8,25 118:16 121:9 123:1 126:7 127:20  <b>finely</b> [1] 133:18  <b>finish</b> [2] 74:6 136:11  <b>firm</b> [1] 32:11  <b>First</b> [20] 5:4 6:21 10:13 24:12 38:25 44:2 50:23 89:5 91:12 101:22 102:7 103:18 104:15 108:19 109:22 111:12 113:25 114:17 133:15 136:8  <b>firsthand</b> [1] 118:20  <b>fit</b> [1] 117:1  <b>five</b> [3] 44:24 59:7,9  <b>fixed</b> [2] 44:25 134:18  <b>flaw</b> [5] 34:12 37:12 38:20 42:11 74:12  <b>flawed</b> [6] 9:4 30:6 34:21 37:8,10 42:8  <b>flaws</b> [4] 39:24 49:6,16 50:7  <b>floor</b> [1] 135:11  <b>FLYNN</b> [55] 2:6 3:9 100:6,7,10 101:20,25 102:7,24 103:14,23 104:1,14 105:9 106:20 107:3,5,11,16 108:15,18 109:6,8 110:21,25 111:4 112:3,8,16,20 113:3,14,20 114:9,16 115:15 116:17 117:7 118:2,14 119:19 120:13,20 121:18 122:10 124:20 126:2,22 127:12,17 129:7,16 130:10 131:2,4  <b>focus</b> [1] 130:9  <b>focused</b> [1] 131:13  <b>focusing</b> [1] 72:22  <b>follow</b> [3] 76:2 103:15 117:22  <b>followed</b> [2] 45:1 82:17  <b>following</b> [2] 74:18 82:16  <b>Footnote</b> [1] 79:9  <b>forced</b> [1] 11:7  <b>forgone</b> [2] 11:23 61:24  <b>form</b> [3] 11:7 58:25 59:15  <b>former</b> [1] 75:18  <b>formulation</b> [1] 39:14  <b>forward</b> [8] 22:18 39:3 40:3 49:2 51:3,9 83:6 97:4</p>	<p><b>found</b> [18] 6:16 12:15 23:10 24:8 26:1 52:12,17 57:21 69:3 83:1 84:22 90:5 95:2 100:24 113:4 114:23 121:3 134:15  <b>four</b> [5] 38:5 39:21 40:3 59:7 64:8  <b>Fourteenth</b> [1] 114:8  <b>frankly</b> [1] 85:23  <b>friend</b> [2] 70:14 125:7  <b>friends</b> [1] 60:4  <b>front</b> [1] 21:15  <b>frozen</b> [1] 120:15  <b>full</b> [4] 28:12 50:15 55:15 103:19  <b>functional</b> [1] 121:24  <b>funny</b> [1] 114:17  <b>further</b> [5] 18:24 83:22 106:15 114:14 135:4  <b>furthest</b> [1] 125:12  <b>future</b> [1] 18:21</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>gave</b> [5] 79:23 80:25 82:4 95:22 134:23  <b>General</b> [23] 2:6 4:13,17 5:11,20,22 8:3 15:9 17:21 19:4 25:23 30:8,13 43:4 115:11,16 133:12 134:23 135:2,5,7,23 136:7  <b>generally</b> [1] 91:14  <b>generated</b> [1] 70:17  <b>generic</b> [1] 87:3  <b>geographic</b> [2] 7:20 45:2  <b>geography</b> [5] 8:15 9:1,22 38:8,9  <b>Gergel</b> [4] 78:20,21,22,23  <b>gerrymander</b> [12] 4:13 5:1 11:22 18:16 20:5 21:16 31:7 40:23 62:23 67:6,11 106:23  <b>gerrymandering</b> [25] 6:2,3,4 8:11 11:12 27:22 40:25 57:9 60:2 63:23 80:24 93:15 95:15 98:11 101:22 104:3 114:10,25 115:6,13,14 131:13,16 134:16,21  <b>gerrymanders</b> [2] 114:21,22  <b>gestalt</b> [2] 38:2,4  <b>gets</b> [1] 21:11  <b>getting</b> [2] 87:8 117:5  <b>give</b> [8] 32:23 41:21 50:22 51:9 73:3 77:12 84:2 123:8  <b>given</b> [11] 28:11 44:14 77:11 86:2 95:13 106:22 107:2 115:24 119:2 120:23 122:16  <b>giving</b> [1] 120:8  <b>glaring</b> [2] 42:11,11  <b>goal</b> [25] 4:18,20 5:12 13:24 40:24,25 43:5 44:5,5</p>
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## Official - Subject to Final Review

<p>45:7 56:10 60:21 63:1,16 64:14 66:5 71:14 81:9 90: 19 99:1 112:11,21 122:19 135:16,23 goals [2] 5:24 129:21 Gomillion [4] 60:13 132:17, 17,23 good-faith [1] 107:8 GORE [102] 2:2 3:3,13 4:7, 8,10 6:14,19 7:23 8:16 9:2 10:8,13 11:16 12:1,18,22 13:5,12 14:13 15:5,22 16: 12,25 17:10 19:1 20:6,13, 19,25 21:8,18 22:6,20 23:2, 5,19,23 24:10,23 25:2,6,14, 17,21 26:4,11,15 27:2,18 28:2,15 30:2 31:8,14,17,19 32:3,9,25 33:3 34:19 35:9, 13 36:22,25 37:3,5 38:23 39:13,25 40:7 42:6 43:25 45:13 46:7 47:3,6 48:11 49:5,12,15 50:1,21 51:13, 17,24 52:1,4,25 53:5,9,25 54:15 55:13,22 74:11 78: 10 131:7,8,10 136:13 GORSUCH [21] 28:1,3 29: 20 43:19 90:22 106:17,21 107:4,6,12,23 108:16,25 109:7 110:4,23 111:2 116: 6,7,25 117:19 Gorsuch's [1] 117:23 gosh [1] 12:7 got [5] 26:25 52:22 67:11 70:3 129:2 gotten [1] 97:9 govern [1] 50:17 government's [1] 130:18 grab [1] 47:14 grave [1] 131:15 great [2] 50:21 105:2 greater [5] 41:4,18 44:16 76:7 119:16 ground [4] 61:18 73:17 107:21 113:25 guess [12] 14:7 50:2,7 51: 22 94:17,23 96:12 97:15 103:21 128:23 129:12 130: 7 guidelines [4] 66:4 83:20 134:25 135:4 guiding [1] 62:12 gun [3] 14:12 15:19,20 guy [2] 79:1 82:2</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p>half [3] 44:18 113:25 114:2 hand [1] 21:13 happen [3] 26:13 71:5 136: 5 happened [4] 61:25 98:25 108:1 128:19 happening [3] 24:8 86:3 130:4</p>	<p>happy [1] 108:8 hard [4] 10:1 14:9 52:20 118:18 harder [1] 41:11 hardly [1] 8:21 harm [2] 77:23 83:6 harsher [1] 39:12 hear [2] 4:3 50:3 heard [7] 46:19 48:21 81: 16 132:4 134:13,22 135:24 hearing [1] 130:21 heart [3] 48:19 63:14 72:21 heaviest [1] 59:8 heavily [3] 34:9 84:15 92: 12 heavy [3] 123:7 125:21,22 Heights [1] 102:12 held [2] 61:13 115:1 helped [2] 31:6 85:20 helpful [3] 15:3 127:25 130: 8 high [3] 58:4 117:13,17 higher [6] 24:18,21,25 92: 18 111:9 129:2 highest [4] 26:4 56:20 72: 23 73:12 highlighted [1] 94:21 highly [1] 50:12 himself [1] 9:22 historic [1] 73:6 historical [1] 56:25 history [2] 5:18 133:20 hold [1] 23:17 holding [2] 6:1 22:25 holds [1] 10:22 holes [2] 41:20 52:20 hollow [3] 79:17 95:5,6 home [2] 45:22 62:10 honesty [2] 79:7,8 Honor [9] 59:22 78:4 81:10 82:5 85:5 89:2,8 112:8 131:4 Honors [1] 100:5 hope [1] 121:25 hopes [1] 116:3 host [1] 132:25 House [7] 70:23 71:1 111: 12 132:6,13 135:1,4 however [1] 39:15 hundred [3] 26:20,22 31: 24 hurdles [1] 101:8 hyper-entangled [1] 5:9 hypothetical [3] 22:23 24: 13 97:3 hypothetically [1] 30:6</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p>I-26 [1] 26:22 idea [2] 94:8 107:19 identical [1] 56:15 identifies [1] 128:7 identify [1] 4:23</p>	<p>ignore [2] 6:6 60:4 ignored [3] 16:2 51:2 53: 14 II [17] 8:10 11:20 12:3 27:20, 23 32:17,17 39:4,8,18 51:5, 6,15,25 52:1,12 57:16 illegal [1] 112:15 illegitimate [1] 71:21 illuminate [1] 129:14 illustrate [1] 133:6 illustrates [1] 37:12 Imai [10] 40:4 69:10,16 83: 11,20 84:25 85:16,20 86:6 88:14 Imai's [2] 83:17 84:7 impact [1] 44:16 impacted [2] 73:15,20 imperfect [1] 115:20 imperiled [1] 132:13 importance [1] 32:23 important [2] 33:5 89:25 importantly [1] 82:25 impose [1] 101:7 impossible [1] 34:2 improper [1] 98:17 improved [2] 44:22 106:12 in-depth [1] 80:2 inapt [1] 42:18 incentive [1] 18:20 include [3] 74:19 75:1 128: 9 included [3] 31:14 66:6 128:25 includes [2] 53:10 84:13 including [6] 49:6 56:13 80:8,21 135:15,21 inconsistent [2] 79:12 82: 14 incorrect [2] 30:3 134:25 increase [2] 63:24 65:25 increased [3] 63:8 91:19 132:7 increasing [1] 4:18 incredible [2] 27:8 80:7 indeed [2] 57:15 90:17 indicated [1] 88:25 indication [1] 134:23 individual [1] 77:23 individualized [2] 91:24 92:1 inevitably [1] 120:22 infected [1] 23:23 infer [1] 6:6 information [4] 18:9,10 105:16,17 informed [1] 39:5 initial [3] 6:24 36:2,2 inquiries [1] 103:5 inquiry [5] 16:18 17:1 100: 19,20 102:13 instance [3] 103:18 105:22, 22</p>	<p>instances [1] 58:4 instead [9] 14:6 34:22 38:2 49:7 61:10 67:10 108:24 111:22 133:17 instruct [1] 103:15 instructed [1] 65:16 intent [16] 6:6 14:9 16:9,20 17:18 27:10,11 74:16 101: 13,18 102:10,21,22 103:1, 4,7 intentional [3] 102:11 103: 6 132:23 intentionally [1] 132:21 interest [4] 56:8 71:18 135: 3,6 interested [2] 101:16 110: 6 interests [2] 45:9,21 interpretation [1] 51:10 interrupt [4] 28:4 29:21 62: 18 65:22 intervened [1] 70:25 inverse [2] 57:16 99:10 involved [5] 30:4 44:19 104:4 117:6 132:11 irreconcilable [1] 5:17 irrelevant [2] 16:9 93:23 island [1] 46:24 islands [1] 134:10 isn't [8] 54:13,23 72:1 73: 10 79:3 81:14 111:20 112: 11 isolate [1] 106:16 isolated [1] 121:10 issue [8] 7:11 30:17 46:16 49:9 84:8 88:17 122:2 127: 10 issues [1] 21:1 itself [9] 11:11 15:6 19:3 28:16 30:11 44:19 53:18 80:5 133:4</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p>JACKSON [51] 13:13 14: 14,23 23:21,25 24:11,21, 24 25:3,11,16 27:9 48:16, 17 49:11,13,18 50:2 51:12, 14,21,25 52:2,13 53:3,8,10 54:6 55:6,21,24 66:24 75: 23 94:16,17 95:17,20 96:4 97:2 98:9 99:16,25 126:11, 12 127:2,16,22 129:10,24 130:18 131:3 jerry-rigging [1] 36:9 Jim [1] 45:14 job [3] 36:19 101:2 119:3 Joe [1] 45:18 JOHN [5] 2:2 3:3,13 4:8 131:8 join [1] 26:23 Joint [4] 7:8 37:11 42:23 47:9 Jordan [3] 55:4 135:20,22</p>	<p>Judge [3] 78:20,22,23 judges [1] 77:8 judging [1] 123:12 judgment [3] 21:10 23:11 34:8 jurisdictional [1] 7:9 jurisprudence [2] 61:19 63:15 Justice [325] 2:7 4:3,10 6: 14 7:18 8:13,18 9:13 10:5, 9,10,16,17,18,20 11:25 12: 19,22 13:6,8,13 14:13,23 15:12 16:5,22 17:2,9 18:1 19:16 20:13,24 21:2,9 22: 5,7,21,25 23:3,9,21,25 24: 11,12,21,24 25:3,11,16,19, 25 26:5,14,16 27:7,9 28:1, 3 29:20 31:1,13,16,18 32:4, 22 33:1,20,22,23,24 34:20 35:11 36:17,23 37:1,4,17, 18,18,20 38:19,24 39:10, 20 40:5,17,17,18,19 43:18, 18,20,21,25 45:11 46:5,10, 10,12 47:5 48:8,14,15,15, 17 49:10,11,13,18 50:2 51: 12,14,21,25 52:2,13 53:3,8, 10 54:6 55:6,19,21,24,25 56:5 58:1 59:17,23 61:1 62:14,17 63:12,18,22 64:3, 6,8,11,20,24 65:7,18,21 66: 2,10,15,24,25 67:2,9,24 68: 1,7,10,13,20 69:16,19,22 71:10,20,22 72:15 73:1,9 74:5,10 75:10,23,24 76:2, 15,23 77:25 78:2,5,5,7,8, 19,23 79:6,15,21,23 80:13 81:5,13,21,24 82:11 83:8, 14,25 84:20 85:6,10 86:6, 17,20 87:9,14,19 88:1,7,18, 19,19,21 89:3,9,11,20 90:7, 20,21,21,22,23,24 92:7,13, 17,21,23 93:16 94:13,14, 14,16,17,19 95:17,20 96:4 97:2,3 98:9,11 99:16,16,25 100:3,6,10 101:13,24 102: 5,14 103:11,21,23 104:6, 23 106:17,21 107:4,6,12, 23 108:16,25 109:7 110:4, 23 111:2,19 112:4,10,19, 22 113:5,7,9,10,17 114:6, 11,11,12,13,13,15,16 116: 5,5,7,12,25 117:19,20,20, 22,23 118:8 119:7,8,11,22, 25 120:18 121:13 122:5,20, 21,21,23 123:14 125:17 126:9,10,10,12,13 127:2, 16,22 129:10,24 130:18 131:3,5 136:11,16 justiciable [1] 6:3 justification [2] 65:11 90: 2 justifications [2] 65:1 89:</p>
--	---	---	--	---

## Official - Subject to Final Review

<p>24</p> <p><b>K</b></p> <p><b>KAGAN</b> [37] 8:13,18 10:16, 20 11:25 12:19 13:6 16:22 17:2 18:1 19:16 20:24 21: 2,9 22:5,7,21,25 23:3,9 31: 1,13,16 40:17,18 67:2,9 69: 19,22 85:10 90:21 99:16 114:15,16 116:12 119:11, 25</p> <p><b>Kagan's</b> [2] 24:13 119:8</p> <p><b>Kavanaugh</b> [28] 43:20,21 44:1 45:11 46:5 55:19 73: 1,9 90:23,24 92:7,13,17,21, 23 93:16 94:13 98:12 117: 21,22 118:8 119:7,22 120: 18 121:13 122:5,20 126:13</p> <p><b>keep</b> [10] 26:24 45:7,23 46: 3 51:23 72:10 75:17 76:6, 9 115:3</p> <p><b>keeps</b> [1] 123:19</p> <p><b>kept</b> [5] 46:2 76:20 91:4 92: 1 112:24</p> <p><b>key</b> [3] 14:19 94:1 123:22</p> <p><b>kicking</b> [1] 98:23</p> <p><b>kind</b> [23] 11:24 12:5,6,7 13: 15 28:4 39:2 46:23 49:3 50:3 54:23 98:15 99:17,18 109:13 114:18 118:5,18 123:15 125:19 126:5 129: 11 130:15</p> <p><b>kinds</b> [2] 11:15 55:1</p> <p><b>knowledge</b> [1] 80:2</p> <p><b>knows</b> [2] 20:15 21:12</p> <p><b>L</b></p> <p><b>lack</b> [2] 105:1 130:22</p> <p><b>land</b> [2] 80:11 113:15</p> <p><b>large</b> [2] 61:7 90:12</p> <p><b>largely</b> [2] 4:14 65:12</p> <p><b>last</b> [8] 8:7 61:14 71:17 82: 12 87:9 125:17</p> <p><b>laudatory</b> [1] 112:12</p> <p><b>law</b> [4] 11:6 101:8 107:20 112:7</p> <p><b>lead</b> [4] 62:22 65:14 72:17 74:17</p> <p><b>lead-up</b> [1] 66:22</p> <p><b>Leader</b> [1] 55:4</p> <p><b>LEAH</b> [3] 2:4 3:6 56:3</p> <p><b>lean</b> [2] 54:11 131:23</p> <p><b>least</b> [9] 12:23 56:21 62:11 72:14 80:17 81:4 90:24 96: 15 122:12</p> <p><b>leaves</b> [1] 32:10</p> <p><b>leaving</b> [1] 72:23</p> <p><b>led</b> [2] 40:11 63:8</p> <p><b>left</b> [2] 5:25 121:7</p> <p><b>legal</b> [23] 6:20 10:6,8,11,13 12:20 13:4 15:21,22 16:22 17:4 19:22,25 23:24 31:10 32:14 56:7 57:12 102:3</p>	<p>103:16 109:13 123:2,5</p> <p><b>legislative</b> [11] 62:3,15,24 64:25 65:3 67:15 70:18 89: 18 90:9 117:2 134:22</p> <p><b>legislator</b> [1] 14:19</p> <p><b>legislature</b> [22] 16:8 26:17 36:21,24 60:18 66:4,17 71: 13 74:16 75:2,7 78:12 89: 16,25 105:13 106:22 107:9 108:7,12 123:9 134:16,17</p> <p><b>legislature's</b> [3] 64:13 117: 18 126:25</p> <p><b>legislatures</b> [1] 89:23</p> <p><b>legitimate</b> [4] 63:1,16 71: 18 81:9</p> <p><b>less</b> [4] 20:5 27:19 47:22 90:6</p> <p><b>level</b> [6] 21:5 30:15 49:23 88:6 128:7 133:18</p> <p><b>lied</b> [1] 79:18</p> <p><b>light</b> [10] 34:11 50:15,25 53: 7 57:10 77:13 118:12 123: 2,6,11</p> <p><b>likely</b> [3] 97:21 122:11,13</p> <p><b>limited</b> [2] 109:21 115:20</p> <p><b>linchpin</b> [1] 120:6</p> <p><b>line</b> [15] 7:16 19:9 24:3,3,9 27:23 40:19 44:21 54:8 55: 22 56:9 100:14 112:22 120:23,25</p> <p><b>line-drawing</b> [4] 89:17 90: 5 103:10 104:22</p> <p><b>lines</b> [14] 17:22 19:13 21:3 26:13 47:11 106:10 109: 10 113:24 119:1 121:12 122:15 129:18 134:24 136: 3</p> <p><b>listened</b> [2] 95:13 96:19</p> <p><b>litigation</b> [2] 110:2 111:18</p> <p><b>little</b> [6] 13:16 41:11 45:12 48:18 69:20 72:18</p> <p><b>Liu</b> [15] 37:6,8 40:20 41:6 42:10,16 58:12,16 84:9 85: 17 86:8,10 87:11 88:23 106:7</p> <p><b>Liu's</b> [3] 42:9,13 58:19</p> <p><b>live</b> [3] 26:13,22 87:20</p> <p><b>lived</b> [1] 7:17</p> <p><b>lives</b> [1] 133:17</p> <p><b>local</b> [1] 117:6</p> <p><b>location</b> [4] 7:15 8:7 36:12 88:9</p> <p><b>long</b> [2] 78:11 87:10</p> <p><b>longer</b> [1] 43:16</p> <p><b>Look</b> [33] 8:25 12:4 15:15 16:19 18:9 19:19 21:6,19 22:16,21 41:14 50:6 58:13 59:2 66:19 73:17 79:13 82: 2,7,7 84:12,14 85:13 86:23 93:3 94:2 95:22 105:14,20 117:24 119:4 121:24 122: 1</p>	<p><b>looked</b> [13] 19:17,21 21:3 23:14 28:8 35:4 66:14 76: 24 85:23 86:24 87:5 89:3 118:8</p> <p><b>looking</b> [43] 18:20 21:14 26:17,18 27:10,16 38:2 39: 21,22 43:2 53:23 60:7 67: 14,16 68:5,16 69:3,4 70:10 71:24 72:6,9 75:20,21 77: 3 88:4 96:13 97:17 99:7, 11,13 103:19 106:12 115: 22 121:18,20 122:6 124:23 125:1,3 126:8 127:3,18</p> <p><b>looks</b> [3] 59:4 85:15 124: 21</p> <p><b>lose</b> [1] 41:7</p> <p><b>lost</b> [1] 60:14</p> <p><b>lot</b> [9] 13:10 48:12 61:2 73: 7 92:24 103:24 122:25 130:21 135:24</p> <p><b>lots</b> [1] 18:13</p> <p><b>loves</b> [1] 45:14</p> <p><b>lower</b> [5] 6:5 46:8 93:19 103:15 117:3</p> <p><b>lowest</b> [1] 26:2</p> <p><b>lumped</b> [1] 36:14</p> <p><b>M</b></p> <p><b>Mace</b> [1] 122:9</p> <p><b>made</b> [31] 4:15 5:20 8:4,6 9: 10 12:16 17:11 21:10 23: 11 27:16 32:12 33:5 38:16, 21 40:9 44:7 47:21 58:17, 21 102:9,25 103:18 113:2 116:17 121:17 123:11 124: 1 125:7 127:20 134:6 135: 17</p> <p><b>magnitude</b> [1] 37:12</p> <p><b>main</b> [2] 119:14 120:7</p> <p><b>maintenance</b> [1] 80:21</p> <p><b>majority</b> [13] 5:15 11:19 29: 13 33:15 44:13 55:3 57:16 59:9 71:6,7 132:3,15 136: 15</p> <p><b>majority/majority</b> [1] 13: 21</p> <p><b>majority/minority</b> [6] 13: 22 14:1,15 51:16 113:18, 23</p> <p><b>makeup</b> [3] 75:5,9 79:11</p> <p><b>malleable</b> [2] 6:8 131:17</p> <p><b>manner</b> [1] 136:4</p> <p><b>manufactured</b> [1] 128:2</p> <p><b>many</b> [5] 20:19 25:7 32:12 48:11 80:10</p> <p><b>map</b> [91] 5:5 9:7 10:14,20 11:9,14 12:8,11,12 13:3 14:19 15:5,8,14,17 18:9,11 20:9,15 21:20 23:8 30:23, 23 33:11 46:1,6 53:20 55: 13 56:14,16 57:13 58:2,10 59:2,7,13,25 61:6 62:12 64:13,19 65:4,4,12,15,16</p>	<p>67:16,23 70:24 71:1,14 72: 14,14 73:16 82:21 83:2,5, 10 84:12 85:14 87:1,3 93: 24 94:5,6 96:17,23 104:10, 18 106:18 107:22 108:21 109:20 110:3 113:2 123: 25 125:13 127:24,25 129: 10,14,17 130:3,7,20 131:1, 11,22 132:18,22 133:24</p> <p><b>map's</b> [1] 55:15</p> <p><b>map-drawing</b> [2] 19:11 109:2</p> <p><b>mapmaker</b> [6] 21:11 22:16 72:6 105:14 128:7,17</p> <p><b>mapmakers</b> [12] 23:11 31: 6 56:17,23 57:17 60:24 114:20 115:11,19 116:2 125:4,10</p> <p><b>mapmakers'</b> [1] 100:22</p> <p><b>maps</b> [27] 11:23 15:13 19: 24 22:11 33:13 37:1 53:16 62:2 69:6 70:23 71:3 78: 13,17 83:11,15 84:22,23 86:24 88:23 109:3 111:8, 12,20 112:23 127:23 131: 25 132:2</p> <p><b>Maptitude</b> [1] 60:24</p> <p><b>Margie</b> [1] 135:9</p> <p><b>Massey</b> [2] 55:3 135:19</p> <p><b>massive</b> [1] 56:21</p> <p><b>matter</b> [9] 1:17 12:24 50:14 92:16 101:8 107:20 110:7 112:12 113:10</p> <p><b>Matthews</b> [1] 135:9</p> <p><b>Max</b> [1] 87:17</p> <p><b>meager</b> [2] 11:21 109:22</p> <p><b>mean</b> [34] 8:20 10:21 17:3 18:9,17 19:18,19 22:10 24: 1 31:22 34:3 47:10 49:2, 19 53:9 54:7 61:21 65:7, 22 67:2 69:22 70:3 78:19, 25 81:25 85:16 91:11 103: 2 105:2,7,7 107:24 120:21, 25</p> <p><b>means</b> [9] 56:10 60:20 63: 1,16 71:17 77:23 81:11 90: 18 98:25</p> <p><b>meant</b> [1] 7:25</p> <p><b>measure</b> [4] 22:3,8 25:22 28:22</p> <p><b>measures</b> [1] 28:23</p> <p><b>meet</b> [1] 6:17</p> <p><b>meets</b> [1] 112:2</p> <p><b>members</b> [2] 66:16 77:24</p> <p><b>mention</b> [4] 33:9 34:13 42: 7 134:5</p> <p><b>mentioned</b> [9] 48:4 73:2 80:2 90:25 99:3 103:2 119: 11,25 132:16</p> <p><b>mere</b> [3] 20:20 27:3 136:1</p> <p><b>merely</b> [3] 11:9 57:23 83: 21</p>	<p><b>messages</b> [2] 55:5 135:21</p> <p><b>met</b> [5] 32:15 49:23 64:13 114:1 117:14</p> <p><b>meta</b> [1] 128:6</p> <p><b>method</b> [9] 25:22,22 87:8, 12,15,19,22 88:5 96:25</p> <p><b>methodological</b> [3] 49:3, 16 52:19</p> <p><b>methodologies</b> [1] 48:25</p> <p><b>methodology</b> [14] 9:3,4 34:10 37:25 42:8 48:13 52: 11 74:12 76:5,24 77:4 106: 11 118:6 124:21</p> <p><b>methods</b> [5] 45:3 57:2 58: 15 83:21 86:13</p> <p><b>middle</b> [1] 46:24</p> <p><b>midway</b> [1] 65:2</p> <p><b>might</b> [9] 10:24 23:14 60: 12 85:7,13 104:15 115:2 118:17 127:4</p> <p><b>miles</b> [2] 26:20,22</p> <p><b>Milk</b> [2] 24:15,19</p> <p><b>mind</b> [4] 28:6 60:11 72:8 99:22</p> <p><b>mini-trial</b> [1] 109:23</p> <p><b>minimizing</b> [1] 80:22</p> <p><b>minority</b> [2] 93:7 103:8</p> <p><b>minute</b> [1] 106:19</p> <p><b>mirror</b> [1] 8:16</p> <p><b>misconstruction</b> [1] 15: 23</p> <p><b>missing</b> [1] 109:7</p> <p><b>misunderstanding</b> [1] 47: 2</p> <p><b>mix</b> [1] 130:14</p> <p><b>mixed</b> [2] 73:7,19</p> <p><b>Mmm-hmm</b> [3] 64:4 107:3, 11</p> <p><b>modest</b> [1] 109:5</p> <p><b>Moreover</b> [6] 5:19 9:6 22:1 27:5 30:19 31:10</p> <p><b>morning</b> [1] 4:4</p> <p><b>most</b> [12] 30:21,25 33:5 44: 6 45:16 52:12 65:3,3 73: 12 106:7 110:11 116:20</p> <p><b>motions</b> [1] 58:22</p> <p><b>motivation</b> [1] 51:20</p> <p><b>motive</b> [1] 51:20</p> <p><b>mountain</b> [1] 43:1</p> <p><b>mountains</b> [1] 17:24</p> <p><b>move</b> [11] 15:17 31:19 35: 19 44:6,15,18 88:2 98:4 128:12 136:8,8</p> <p><b>moved</b> [41] 7:4,7 24:2,25 25:6,12 27:1 35:2,2 36:5,7 44:7,11 51:7,7 56:14 59:8 62:9 73:3 74:3 76:20,21 83:3 84:15,16,17 87:23 88: 8,13,15 92:10,14,19,24 98: 3,22 120:16 121:2 128:3, 18,22</p> <p><b>movement</b> [9] 56:21 73:14,</p>
--	--	---	---	---



## Official - Subject to Final Review

<p>22,25 80:10 82:13 90:12  93:8 111:22  <b>movements</b> [2] 81:18 111:24  <b>moves</b> [1] 37:10  <b>moving</b> [10] 4:20 35:17 54:8 62:3 72:24 97:4 98:14, 19,20 129:3  <b>Ms</b> [148] 56:2,5 58:8 59:22 60:11 61:20 62:15,20 63:13,21 64:2,4,7,10,16,23,25 65:11,19 66:1,3,13,19 67:7,13 68:4,8,11,15,24 69:17,21 70:1 71:16,21 72:5 73:5,11 74:7 75:4,18,23,23 76:1,14,16 77:2 78:1,4,14,22 79:5,8,19,22 80:5 81:2,8,16,23 82:5,20 83:12,17 84:5 85:4,9 86:9,18,22 87:13,16,25 88:3,10 89:1,7,15,22 90:17 91:14 92:11,14,20,22 93:1,23 95:9,19 96:2,15 98:7,18 99:22 100:1,5,6,10 101:20,25 102:7,24 103:14,23 104:1,14 105:9 106:20 107:3,5,11,16 108:15,18 109:6,8 110:21,25 111:4 112:3,8,16,20 113:3,14,20 114:9,16 115:15 116:17 117:7 118:2,14 119:19 120:13,20 121:18 122:10 124:20 126:2,22 127:12,17 129:7,16 130:10 131:2,4  <b>much</b> [8] 9:22 22:22 35:20 44:16 48:8 62:13,19 95:13  <b>multiple</b> [2] 115:23 121:25  <b>municipal</b> [1] 132:19  <b>must</b> [2] 9:17 50:17  <b>myself</b> [1] 130:1</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>NAACP</b> [3] 1:10 4:6 78:1  <b>name</b> [1] 78:21  <b>Nancy</b> [1] 122:9  <b>narrative</b> [1] 85:21  <b>National</b> [1] 71:2  <b>natural</b> [1] 45:1  <b>nearly</b> [2] 58:20 82:13  <b>necessarily</b> [3] 130:2,19,20  <b>need</b> [6] 15:18,19,20 55:9 107:20 115:9  <b>needed</b> [7] 5:11 11:22 12:2,8 55:7,9 68:21  <b>needs</b> [2] 19:23 59:15  <b>nefarious</b> [1] 108:8  <b>neighborhood</b> [1] 44:8  <b>neighbors</b> [2] 91:18,19  <b>neither</b> [7] 2:9 3:11 11:10 100:9 132:6,8,10  <b>net</b> [4] 35:8 77:1,3 93:2  <b>never</b> [10] 37:23 54:2 61:5 68:25 70:5 74:4,7 83:15</p>	<p>85:6 89:3  <b>New</b> [5] 2:4,4 61:18 93:12 105:22  <b>next</b> [1] 122:9  <b>nice</b> [1] 79:18  <b>Nobody</b> [1] 19:23  <b>non-credible</b> [4] 6:17 57:22 69:4 79:13  <b>non-justiciable</b> [1] 115:1  <b>non-presidential</b> [1] 22:9  <b>non-requirement</b> [1] 106:19  <b>none</b> [4] 12:5,5,6,6  <b>nor</b> [2] 11:8,10  <b>normal</b> [1] 8:23  <b>normally</b> [4] 32:5,6 58:1 107:24  <b>North</b> [2] 54:9 105:11  <b>nothing</b> [6] 5:14,14 40:15 42:5 96:9 134:11  <b>notwithstanding</b> [3] 67:14 76:18 93:9  <b>novo</b> [3] 50:4,9 127:3  <b>number</b> [16] 20:4 35:5,16,19 42:18,20,20,22 48:6,7 74:23 76:7,25 94:20 100:24 128:18  <b>numbers</b> [6] 26:9 27:8,8 34:22 49:7 80:19</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>objecting</b> [1] 108:10  <b>objections</b> [4] 9:2 48:12 49:24 50:20  <b>objective</b> [3] 83:20 107:14 109:1  <b>objectives</b> [1] 23:7  <b>obligation</b> [1] 117:11  <b>obviously</b> [3] 47:1 118:9 132:1  <b>occasion</b> [1] 103:20  <b>occurred</b> [1] 85:6  <b>occurring</b> [1] 96:23  <b>October</b> [1] 1:15  <b>odd-shaped</b> [1] 60:1  <b>oddities</b> [1] 118:25  <b>oddly</b> [3] 104:10 105:1 128:2  <b>offensive</b> [1] 92:5  <b>offer</b> [1] 130:11  <b>offered</b> [2] 104:19 111:5  <b>offers</b> [1] 94:4  <b>office</b> [4] 93:18 94:3 103:24 104:13  <b>OFFICIAL</b> [1] 1:4  <b>offset</b> [3] 47:18 63:10 91:21  <b>offsetting</b> [1] 98:22  <b>often</b> [3] 14:16 60:1 118:24  <b>Okay</b> [13] 10:16 26:14 36:17 47:5 50:2 74:25 79:15,21 87:9 107:6 122:20 126:9 127:22</p>	<p><b>Oldham</b> [1] 30:4  <b>once</b> [5] 51:13 64:16 70:19 99:12 136:9  <b>one</b> [59] 9:15 11:7,20 13:8 21:21,21 22:13 23:15 26:21 27:24 30:7,24 32:9 35:9 36:18 37:5,23 38:10,19 41:12 42:18 45:16 48:19 58:3 64:12 67:20 75:1,17 76:6,7,12 79:25 80:1,14,15 82:12 83:12 85:13 86:23 87:5,22,23 88:1 89:4 91:23,23 94:6 102:16 104:12,24 105:3,7 111:13 116:22 121:19,20 128:11 133:13,14  <b>one-to-one</b> [1] 91:22  <b>ones</b> [1] 91:24  <b>only</b> [34] 5:1,6 11:23 18:18 26:7,21 28:20,22 34:5 35:4 36:9 41:9 46:7 48:5 56:23 59:9 62:4 65:6 69:9,11,11 71:24 72:17 75:7 88:10 92:3 96:24 98:19,19 111:25 112:12 129:21 133:13 134:19  <b>onset</b> [1] 99:3  <b>operating</b> [1] 97:20  <b>operative</b> [1] 130:25  <b>opinion</b> [13] 10:23 11:19 16:4 42:10,16 67:8 77:13 79:16 91:16 93:3 98:25 112:17 127:14  <b>opinions</b> [3] 6:22 7:10,14  <b>opportunity</b> [2] 18:18 81:20  <b>opposed</b> [7] 35:3,3 50:5 76:11 90:12,13 135:10  <b>opposing</b> [1] 73:2  <b>opposite</b> [2] 116:10 117:25  <b>oral</b> [7] 1:18 3:2,5,8 4:8 56:3 100:7  <b>order</b> [8] 19:25 20:11 22:18 69:1 99:21 114:20 122:19 129:4  <b>original</b> [1] 93:17  <b>other</b> [57] 5:21 7:14 9:9,21 12:1,7,10,13,17,20 15:21 16:15 21:22 22:14 23:5,7 26:3 27:25 29:3 30:8,15 32:5 33:8 34:17 35:24 38:22 39:22 40:22 47:7,14,17 49:1 51:2,15 53:15 54:3,4 60:4 87:23 88:2 93:16 94:7 96:21 108:9,14,24 109:12 110:10,11,13 112:25 114:5 116:22 119:9 127:2 130:12 132:16  <b>others</b> [4] 38:6,8 40:6 135:25  <b>Otherwise</b> [3] 54:19 85:22</p>	<p>132:25  <b>ourselves</b> [1] 126:21  <b>out</b> [61] 4:21 7:4 9:20 14:14 17:12 24:2 25:12 28:21 34:16 35:2,24 36:5 42:13 47:14 49:5,15,17 51:7 54:16 56:15 59:3,8 62:10,10 71:14 72:24 73:3 74:3 76:20 83:3 91:23 92:10,14,19,24 94:5,7 97:1 98:3,4,12,14,23 106:16 109:3 111:7,23 118:17 119:5 120:16 121:6,10 122:6 123:23,25 124:6 125:15 128:3,18,22 129:3  <b>outcome</b> [3] 15:9 82:9 116:22  <b>outcomes</b> [6] 22:2 28:18,21 29:1,16 70:12  <b>outline</b> [1] 66:7  <b>outlined</b> [2] 123:14 125:20  <b>Outside</b> [1] 114:6  <b>over</b> [21] 9:16 15:7 20:9 24:23 25:24 35:8 38:15 42:5,6 44:10,18 56:12 57:19 62:2 69:15 70:23 75:22 84:23 102:10 119:12 122:13  <b>overall</b> [7] 71:8 73:15 93:9,22 96:24 98:12 118:12  <b>overcoming</b> [1] 107:8  <b>overlapped</b> [1] 124:24  <b>overrida</b> [1] 43:1  <b>overriding</b> [1] 113:22  <b>overstepping</b> [1] 117:5  <b>overwhelming</b> [1] 60:16  <b>owe</b> [4] 122:25 126:18 127:7,10  <b>own</b> [13] 6:23 7:2 14:10 28:24 29:5 33:10,12 36:1,2 46:1 97:1 126:14 136:6</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> [1] 136:19  <b>PAGE</b> [8] 3:2 7:7,8 11:19 29:5 34:13,21 47:8  <b>pages</b> [2] 42:22 76:17  <b>Palace</b> [1] 59:14  <b>Palmer</b> [1] 87:17  <b>panel</b> [24] 4:17,25 5:4,10,19 12:20 17:23 19:2,20 28:16 32:20 33:8 35:14 42:7,9 56:11 57:3,12,21 73:18 78:14 90:1 118:18 134:15  <b>panel's</b> [5] 5:8 15:23 19:9 31:10 57:8  <b>paragraph</b> [1] 93:3  <b>parcel</b> [1] 44:4  <b>Park</b> [1] 93:4  <b>part</b> [8] 9:23 28:11 31:3 44:4 52:8 59:5 100:20 118:15  <b>partial</b> [4] 83:1,5 94:4,6  <b>participation</b> [1] 24:5  <b>particular</b> [17] 11:7 22:23</p>	<p>32:24 33:12 35:25 38:14 40:8,12 44:15 55:12 59:15 67:4 79:2 85:11 95:25 117:10 134:12  <b>particularly</b> [7] 15:3 20:22 28:19 34:4,7 57:12 86:25  <b>partisan</b> [37] 6:2,3 14:7 18:15 22:2 54:10 56:10 57:5,23 62:23 64:14 65:1 67:5,11,20 69:7 70:17 71:14 75:7,20,21 82:3 87:4 99:13,24 106:23,24 108:7,13 109:1 114:21,22,25 115:5,12,14 131:14  <b>partisanship</b> [20] 26:9,18 34:18 37:7 38:7,9 46:17 53:24 55:11 56:12 65:15 66:8,23 71:11 86:19 87:6 89:4,12,14 111:25  <b>parts</b> [1] 5:21  <b>party</b> [12] 2:9 3:11 34:9 56:7 57:1 58:25 70:15 77:17 85:18 100:9 121:8 122:15  <b>past</b> [2] 15:17 78:17  <b>patterns</b> [2] 121:24 122:1  <b>peculiarly</b> [1] 61:14  <b>people</b> [32] 14:2 24:2,25 25:6,7,12 28:21 44:11,19 56:14 62:4 63:6,10,11 66:7,13,20 67:4 77:16 80:10 87:20 91:22 92:3,24 93:5,6 115:2,3 117:3 120:16 121:2 135:15  <b>per</b> [1] 104:3  <b>percent</b> [40] 5:13 22:14,15,17 23:4,4,12,16 24:16,17,17 25:8,9,11,20,20,24 26:6,7 27:24,25 35:20 41:7,8,10 46:7 62:21,22 64:1,2,3 70:24 71:3 72:11,12,13 84:23 91:20 105:6 136:14  <b>percentage</b> [8] 35:17 38:14 41:4 62:19 63:24 72:3 77:1 92:18  <b>percentages</b> [4] 34:23 36:13 49:8 77:4  <b>perfect</b> [1] 37:23  <b>perfectly</b> [1] 132:20  <b>perform</b> [2] 15:6 70:13  <b>performance</b> [2] 57:23 75:8  <b>performed</b> [2] 58:14 87:3  <b>perhaps</b> [1] 113:15  <b>period</b> [1] 36:24  <b>permissible</b> [4] 105:15 106:25 108:14 110:10  <b>permits</b> [1] 112:7  <b>permitted</b> [1] 135:1  <b>person</b> [3] 16:6 27:16 53:16  <b>perspective</b> [1] 31:20  <b>persuade</b> [1] 11:3</p>
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## Official - Subject to Final Review

<p><b>persuaded</b> <sup>[1]</sup> 79:3</p> <p><b>persuasive</b> <sup>[2]</sup> 81:18 130:16</p> <p><b>petulantly</b> <sup>[1]</sup> 15:18</p> <p><b>pick</b> <sup>[1]</sup> 119:7</p> <p><b>picking</b> <sup>[2]</sup> 38:19 47:16</p> <p><b>picture</b> <sup>[2]</sup> 38:4 55:16</p> <p><b>piece</b> <sup>[6]</sup> 47:7 67:20 69:12 107:17 109:14 129:8</p> <p><b>pin</b> <sup>[1]</sup> 53:13</p> <p><b>place</b> <sup>[1]</sup> 100:23</p> <p><b>placement</b> <sup>[1]</sup> 59:6</p> <p><b>plaintiff</b> <sup>[12]</sup> 13:1 55:7,9 59:15 107:7,25 110:9 111:16 112:2 125:22 129:12 130:1</p> <p><b>plaintiff's</b> <sup>[6]</sup> 11:2 51:6 107:21 118:13 125:20 128:5</p> <p><b>plaintiffs</b> <sup>[25]</sup> 6:5 11:7,21 12:16 17:18 39:1,6 43:16 46:15 60:13 77:23 90:3 99:5 100:20,25 101:9 104:8,19 111:5 117:10 119:6 120:5 123:6 128:20 130:11</p> <p><b>plaintiffs'</b> <sup>[3]</sup> 6:16 38:5 42:2</p> <p><b>plan</b> <sup>[31]</sup> 4:15 24:15,16,17,18,19 27:19,20 30:5,5 37:14 43:4 44:7,23,24,25 45:1 46:9 82:14 93:17 111:12 131:20 132:6,6,8,12,13 133:25 134:9,12 135:10</p> <p><b>plan's</b> <sup>[2]</sup> 6:25 37:9</p> <p><b>plans</b> <sup>[5]</sup> 24:14 33:11 43:5 132:5,10</p> <p><b>plausible</b> <sup>[27]</sup> 27:12,14,14 50:15,25 52:15,22 53:7 57:10 70:20 77:22 80:16,25 81:14,25 82:6,8 95:22,23 116:1,9,11,20,23 122:17 126:25 127:20</p> <p><b>play</b> <sup>[2]</sup> 97:11 109:25</p> <p><b>played</b> <sup>[1]</sup> 118:3</p> <p><b>please</b> <sup>[3]</sup> 4:11 56:6 100:11</p> <p><b>plenty</b> <sup>[1]</sup> 19:21</p> <p><b>plurality</b> <sup>[1]</sup> 112:17</p> <p><b>point</b> <sup>[30]</sup> 6:8 9:14,20,20 12:4 17:16 42:18 46:9 48:9 49:5,15 67:11 86:15 90:25 92:17 93:17 97:10 98:6,7 105:7 111:7,19 112:11 116:8,17 118:21 119:23 123:25 125:7 133:1</p> <p><b>pointed</b> <sup>[9]</sup> 14:14 17:12 32:12 35:24 49:16 54:16 98:12 123:23 124:6</p> <p><b>pointed-out</b> <sup>[1]</sup> 39:23</p> <p><b>points</b> <sup>[3]</sup> 9:19 33:8 124:2</p> <p><b>poke</b> <sup>[1]</sup> 41:20</p>	<p><b>poking</b> <sup>[1]</sup> 52:19</p> <p><b>polarized</b> <sup>[1]</sup> 115:25</p> <p><b>policy</b> <sup>[1]</sup> 45:7</p> <p><b>political</b> <sup>[61]</sup> 4:18,22 5:12,20,24,24 15:9 21:24 34:23 35:2,4 40:25 42:18 43:5 44:3,5,16 48:6,7 57:18 58:5,14 59:5 60:3,21 61:8 63:1,3,16 66:5 67:17 69:8,14 70:2,12 85:1 86:11 90:18 99:1,20 100:16 104:11 105:2 112:14,21 113:1 115:19 116:4 118:23 119:10,15,24 120:9,9 121:8,11 122:19 131:23 133:19 135:16,23</p> <p><b>politically</b> <sup>[4]</sup> 35:21 63:9 67:22 91:20</p> <p><b>politics</b> <sup>[58]</sup> 4:16 5:7,9 6:8 7:2 9:10 11:5 13:2 14:20 15:7,25 16:3 17:19 18:4,6,8 28:8,9,20 33:14,17 36:3 40:14,23 44:20 59:19 65:9 71:25,25 83:16 84:2,3 85:7 86:7,21 97:11,23 100:21 101:5 104:21 106:10,16 116:14,14 117:6,11 119:1 123:8,22 124:12 125:24 128:6 131:20 133:7 134:24 135:2,3,12</p> <p><b>poor</b> <sup>[1]</sup> 9:14</p> <p><b>population</b> <sup>[6]</sup> 20:2 46:6 47:17 93:19 103:8 105:5</p> <p><b>Populations</b> <sup>[2]</sup> 56:20 73:13</p> <p><b>portion</b> <sup>[2]</sup> 45:15 46:3</p> <p><b>portions</b> <sup>[1]</sup> 80:18</p> <p><b>position</b> <sup>[5]</sup> 101:20 111:17 115:16 118:5 130:19</p> <p><b>possible</b> <sup>[2]</sup> 47:11 125:8</p> <p><b>possibly</b> <sup>[2]</sup> 84:2 118:18</p> <p><b>post-Cooper</b> <sup>[1]</sup> 52:15</p> <p><b>post-hoc</b> <sup>[1]</sup> 89:24</p> <p><b>post-Rucho</b> <sup>[1]</sup> 114:17</p> <p><b>potentially</b> <sup>[1]</sup> 51:8</p> <p><b>potshots</b> <sup>[2]</sup> 37:21 58:17</p> <p><b>powerful</b> <sup>[1]</sup> 45:17</p> <p><b>practical</b> <sup>[1]</sup> 12:24</p> <p><b>practice</b> <sup>[1]</sup> 103:15</p> <p><b>pre-cleared</b> <sup>[1]</sup> 72:15</p> <p><b>pre-trial</b> <sup>[1]</sup> 86:1</p> <p><b>precedents</b> <sup>[3]</sup> 5:2 6:11 107:1</p> <p><b>precinct</b> <sup>[8]</sup> 20:3 21:21 74:20,23 76:18 93:5,6 133:16</p> <p><b>precincts</b> <sup>[20]</sup> 29:19 30:14 56:19 59:8,10 72:22,23,25 73:7,12,19 74:18 75:6 84:15 88:5,8 92:12 93:8 106:13 124:22</p> <p><b>precise</b> <sup>[1]</sup> 79:1</p> <p><b>precisely</b> <sup>[1]</sup> 132:13</p>	<p><b>predicated</b> <sup>[1]</sup> 89:17</p> <p><b>predict</b> <sup>[5]</sup> 28:18 29:1,6,16 99:24</p> <p><b>predictable</b> <sup>[1]</sup> 90:6</p> <p><b>predicting</b> <sup>[1]</sup> 69:14</p> <p><b>predictions</b> <sup>[1]</sup> 75:22</p> <p><b>predictive</b> <sup>[4]</sup> 18:21 69:6 85:18 99:12</p> <p><b>predictor</b> <sup>[8]</sup> 7:3 22:2 36:4 57:5 69:11 70:12 73:22 86:19</p> <p><b>predominance</b> <sup>[16]</sup> 11:18 20:22 21:5 27:4 31:17 32:21 53:6 96:23 99:6 101:3 102:1,9 103:4 117:14 131:17 136:2</p> <p><b>predominant</b> <sup>[5]</sup> 5:15 11:5 114:7 117:12 136:4</p> <p><b>predominantly</b> <sup>[8]</sup> 5:16 29:11 44:14 73:9,11 92:9,9 136:4</p> <p><b>predominate</b> <sup>[2]</sup> 6:25 56:9</p> <p><b>predominated</b> <sup>[3]</sup> 15:7 56:11 103:9</p> <p><b>predominates</b> <sup>[1]</sup> 113:21</p> <p><b>predominating</b> <sup>[1]</sup> 14:17</p> <p><b>preference</b> <sup>[1]</sup> 63:3</p> <p><b>preferred</b> <sup>[1]</sup> 106:24</p> <p><b>prerequisite</b> <sup>[1]</sup> 11:4</p> <p><b>presence</b> <sup>[1]</sup> 11:10</p> <p><b>present</b> <sup>[3]</sup> 8:14 12:11 100:17</p> <p><b>presented</b> <sup>[4]</sup> 9:6 43:6,10 134:3</p> <p><b>preserved</b> <sup>[2]</sup> 4:14 131:23</p> <p><b>preserves</b> <sup>[1]</sup> 15:8</p> <p><b>PRESIDENT</b> <sup>[11]</sup> 1:4 18:23 22:13,22 35:5 45:19 74:22,22,25 76:8,25</p> <p><b>presidential</b> <sup>[13]</sup> 18:12,17,22 22:8 29:17,24 30:20 70:4 121:14 122:14 126:15 127:6 133:3</p> <p><b>presume</b> <sup>[2]</sup> 17:20 87:23</p> <p><b>presumed</b> <sup>[1]</sup> 90:2</p> <p><b>presumption</b> <sup>[7]</sup> 43:14 107:8 108:17 117:1,8 123:9 126:6</p> <p><b>pretty</b> <sup>[2]</sup> 123:16 125:9</p> <p><b>prevail</b> <sup>[1]</sup> 11:8</p> <p><b>prevailing</b> <sup>[1]</sup> 34:9</p> <p><b>previous</b> <sup>[2]</sup> 105:23 116:18</p> <p><b>previously</b> <sup>[2]</sup> 105:25 124:23</p> <p><b>principle</b> <sup>[2]</sup> 62:12 92:8</p> <p><b>principles</b> <sup>[24]</sup> 7:24 8:2 9:11 23:7 36:11 43:7 44:23 47:8,23 48:1 55:17,23 65:6,13,20 77:20 80:21 85:24 89:19 101:11 105:21 106:3 132:9 134:1</p>	<p><b>prior</b> <sup>[3]</sup> 30:18 72:12 132:18</p> <p><b>priority</b> <sup>[2]</sup> 62:11 81:4</p> <p><b>pro</b> <sup>[1]</sup> 126:5</p> <p><b>pro-defendant</b> <sup>[1]</sup> 126:5</p> <p><b>Probably</b> <sup>[2]</sup> 108:6 110:2</p> <p><b>probative</b> <sup>[12]</sup> 84:8 106:8 107:17 110:17,22 118:12 120:1,4 121:15,16 122:8 129:8</p> <p><b>problem</b> <sup>[9]</sup> 35:7,12,24 68:16 75:25 76:4 80:6 124:7 134:18</p> <p><b>problems</b> <sup>[1]</sup> 35:10</p> <p><b>proceed</b> <sup>[1]</sup> 6:19</p> <p><b>process</b> <sup>[9]</sup> 24:14 62:3,16,24 67:15 70:18 89:18,21 90:9</p> <p><b>produce</b> <sup>[5]</sup> 75:3 81:6 83:10 88:23 130:3</p> <p><b>produced</b> <sup>[2]</sup> 83:11 84:24</p> <p><b>production</b> <sup>[1]</sup> 135:20</p> <p><b>proffered</b> <sup>[1]</sup> 64:17</p> <p><b>pronunciation</b> <sup>[1]</sup> 78:21</p> <p><b>proof</b> <sup>[5]</sup> 11:8 38:16 39:6 59:15 107:25</p> <p><b>proper</b> <sup>[1]</sup> 39:13</p> <p><b>properly</b> <sup>[6]</sup> 17:13 29:18,25 30:13 47:19 56:11</p> <p><b>proportion</b> <sup>[1]</sup> 41:18</p> <p><b>propose</b> <sup>[1]</sup> 70:24</p> <p><b>proposing</b> <sup>[3]</sup> 47:24 62:2 71:3</p> <p><b>protection</b> <sup>[2]</sup> 11:6 59:16</p> <p><b>prove</b> <sup>[8]</sup> 14:10 20:21 27:3 99:5 107:12 111:16 130:4 136:1</p> <p><b>proved</b> <sup>[1]</sup> 60:15</p> <p><b>provide</b> <sup>[1]</sup> 80:16</p> <p><b>provided</b> <sup>[2]</sup> 69:18 94:4</p> <p><b>providing</b> <sup>[1]</sup> 13:3</p> <p><b>province</b> <sup>[1]</sup> 61:15</p> <p><b>proximity</b> <sup>[1]</sup> 7:16</p> <p><b>proxy</b> <sup>[9]</sup> 7:21 14:20 18:6,8 99:23 112:21 115:9,12 116:3</p> <p><b>pure</b> <sup>[1]</sup> 75:20</p> <p><b>purportedly</b> <sup>[1]</sup> 84:4</p> <p><b>purpose</b> <sup>[10]</sup> 21:7,16 38:11 59:12 72:20,21 84:11,18 85:17 99:12</p> <p><b>purposes</b> <sup>[3]</sup> 38:12,13 108:8</p> <p><b>pursue</b> <sup>[2]</sup> 5:24 106:23</p> <p><b>pursued</b> <sup>[2]</sup> 4:18 135:23</p> <p><b>pursuing</b> <sup>[1]</sup> 71:13</p> <p><b>pushing</b> <sup>[2]</sup> 72:25 107:19</p> <p><b>put</b> <sup>[14]</sup> 39:3 40:3 48:22 49:2 51:2,9 83:5 86:25 97:4 104:6 110:18,18 130:23 131:25</p> <p><b>Putting</b> <sup>[5]</sup> 15:12 27:17 53:</p>	<p>19 104:7 130:1</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>question</b> <sup>[41]</sup> 10:5 16:3 17:9 19:3,14 28:5 36:18 40:16,21 42:3 46:12 50:21 54:8 55:8 62:5 74:9 81:21 83:9 84:6 87:9 103:22 104:20 106:8 108:20 109:9 111:6 112:5 114:3 115:10 117:23 119:8,24 123:22 124:2 125:17 126:13 127:15,23 128:4 129:22 136:2</p> <p><b>questioning</b> <sup>[2]</sup> 40:19 53:18</p> <p><b>questions</b> <sup>[7]</sup> 6:13 48:20 53:20 57:25 85:11 94:20 101:12</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>race</b> <sup>[138]</sup> 5:7,9 6:7,25 7:3,6 9:11 11:4 13:2 14:9,16,17,20 15:7,14,24 16:3,11 17:19 18:6,8,13,20 20:21 27:16 28:8,20 33:13,17 36:4,6 41:1 44:20 46:17 53:24 55:11,17 56:8,11,19 57:1,4 58:5,25 59:19 60:20,25 62:8 63:15 65:9 67:21 68:3,5,16 69:3,4,10 70:10,11,15 71:10,11,17,24,25 72:6,9 73:22 75:12,13 77:17,23 78:16 79:14 80:6 81:11 83:4,23 84:1,10 85:18 86:18 90:18 96:22 97:17,22 98:3,16,25 99:14,23 100:14,16,21,22 103:9 104:21 105:13,14,18 106:9,16 111:23 112:1,6,14,20 113:2,12,18,20 114:20 115:3,9,12 116:2 117:11,15 119:1 121:10,11,21 122:14,18 123:8,21 124:12 125:23 126:25 127:10 129:1 130:24 131:19 133:6 135:13,25 136:1,2</p> <p><b>race-based</b> <sup>[1]</sup> 90:10</p> <p><b>race-blind</b> <sup>[1]</sup> 85:21</p> <p><b>race-conscious</b> <sup>[1]</sup> 68:17</p> <p><b>races</b> <sup>[3]</sup> 87:4,5 122:1</p> <p><b>racial</b> <sup>[93]</sup> 4:12,23,25 5:3,8,11,13,21,23 6:4,7 8:11 11:11,18,22 15:10 19:6,14 20:8,15,16,21 21:3,6,12,15,21,22 22:1,2 27:3,4,18,19,21 28:18,22,25 29:6,12 31:5 32:20 33:7 34:23 35:3 44:17 51:18 57:9,19 59:5 60:5 62:1 64:15 67:17 68:10,23 69:7 70:16 75:5,9 77:14 79:11 80:2,23 81:18 92:4 93:14 95:14 98:10 99:5,11,17,18 100:15 101:3,22,25 102:9 103:3 104:2 105:</p>
--	---	--	---	---

## Official - Subject to Final Review

<p>5 113:23 117:15 121:4 126:24 131:12,13,15,17 133:9 134:15,20 136:1 racially [2] 35:21 115:25 Ragusa [26] 6:21 7:14 9:20 35:4 38:6,11 40:20 47:24 48:12,25 49:3,23 58:11,16 69:9 76:14 77:2 84:9,23 85:16,16 87:11 88:14 106: 7,11 131:19 Ragusa's [26] 6:22 7:10 8: 17 9:3 34:13,15,21 36:1 41:10 42:17 46:13 49:20 50:7,20 52:17,23 58:18 59: 2 74:12 76:5 84:21 86:15 123:19 124:3,17 125:14 raise [1] 9:2 raised [8] 6:22 48:11,12 49: 24 86:1 89:14 93:13 118: 24 ramifications [1] 67:22 ran [3] 69:16 83:14 106:15 rang [2] 95:5,6 Rather [15] 4:13 22:17 23:3, 12 28:8 35:7 42:20 48:6 57:19 74:19 75:1 76:9 77: 17 106:13 109:14 reach [2] 103:20 112:11 reached [2] 8:15 112:23 reaches [1] 125:12 read [3] 11:1 13:8 50:23 reading [3] 12:19 19:2 116: 20 reality [1] 73:17 really [19] 8:24 10:4 13:14 18:15 48:24 49:22 52:7 53: 13 66:2 69:23 99:18 108: 21 110:5,16,22 111:17 120: 6 124:16 129:25 reason [18] 5:22 29:8,16 35:2,3,4 51:18 64:11 68: 18 81:25 90:4,15 99:15 113:16 122:17,18 123:18 133:12 reasonable [3] 13:19 125: 14 130:11 reasoning [1] 19:9 reasons [15] 18:7 31:9 44: 3 55:19 67:25 79:24 82:4 90:18 94:20 96:10,16,17 112:14 113:1 132:25 rebut [1] 81:23 REBUTTAL [6] 3:12 59:3 76:16 84:13 131:7,8 recent [3] 5:18 30:22,25 recently [1] 61:13 recognize [1] 119:2 recognized [9] 39:4 47:20 73:14,18 79:9 81:10 83:23 91:15 100:12 record [56] 19:2,22 23:19 31:9 32:7,18 33:2 50:16,</p>	<p>25 53:7,17 55:5 57:11,15 65:1 67:3 69:18 70:9 77: 13,22 78:12 82:7,24 85:5 88:22 89:10 91:2,11 93:22 94:9 96:3,22 99:6,9,10 100:1 103:12,19 105:10 111:8 115:18 116:20 117: 25 118:9,12 119:20 121:19 123:12 126:23 127:19 130: 16 131:25 132:5 133:14 134:23 136:5 records [1] 19:24 redistribute [1] 102:17 redistrict [1] 101:8 redistricting [11] 58:2 65: 6,13,20 71:2 77:19 85:24 89:18 101:9 102:17 105: 20 redrawing [1] 132:20 reflect [1] 99:9 reflected [1] 96:22 reflective [1] 88:11 reflects [14] 65:1 70:9 72:9, 11 77:14,15,16,18 82:24 83:18 85:5 94:9 99:11 100: 2 regardless [1] 88:8 Register [3] 73:17 77:9 95: 12 regression [5] 41:19,23 42:17 48:5 106:15 regressions [1] 41:14 reject [1] 58:23 rejected [7] 16:6 39:9,18 40:2 93:14 101:6 111:21 rejection [1] 57:13 rejects [1] 6:20 related [1] 15:1 relatively [1] 109:5 relevance [1] 93:21 relevant [2] 35:16 124:16 reliability [3] 19:4 120:1 127:6 reliable [12] 9:5 19:12 30: 16 39:16 52:18 118:11 121:14,16 126:16 133:7,9, 9 relied [15] 28:16,17 35:14 39:16 46:16 52:10,10,16 57:23 67:20 84:6 105:18 116:2 120:8 133:5 relies [2] 34:9 49:20 relitigating [1] 86:4 rely [8] 11:22 18:16 42:24 61:23 86:8,10 121:17 122: 18 relying [12] 53:19 57:19 61: 23 67:21 68:2 70:16 88:5 89:21 98:16 99:14 108:21, 22 remain [3] 92:2 128:21 131: 13</p>	<p>remained [4] 24:5 41:9 56: 15 111:20 remains [1] 98:13 remand [2] 102:2,23 remedial [2] 134:14,14 Remember [1] 25:7 removed [1] 59:10 removing [2] 15:10 56:19 renders [1] 126:23 repackaged [1] 6:4 repeatedly [1] 101:6 reply [2] 34:14 54:16 report [16] 6:24 34:15 36:2, 3 46:13 49:23 50:9,20 52: 24 59:3 76:16 79:2,2 84:3, 13 123:19 reports [7] 34:10 49:6 67: 16 70:16,17 86:24 123:20 represent [3] 45:9,15 91:6 representative [12] 45:23 55:4 82:22 83:1,5 91:5,7 93:18 94:3,10 135:19,22 representatives [1] 45:8 representing [1] 45:21 Republican [20] 4:19 20:5 22:19 24:18 31:7 45:23 65: 25 71:2 72:2 74:15,17 75: 2,16 81:7 91:4 97:13 119: 17 131:23 132:7 136:15 Republican-leaning [10] 65:17 72:18 75:3 91:24 111:10,21 112:24 128:8,9, 24 Republicans [4] 4:20,23 37:2 78:13 require [3] 13:19 94:24 100:18 required [9] 16:19 17:14, 16,20 34:1 37:23 55:15 60: 14 110:17 requirement [17] 5:5 10: 15,21 11:14 12:13 15:6 33: 12 43:15 57:14 85:12 106: 19 109:13,20 110:6 114:5 131:11,24 requires [5] 16:18 38:10 53:2,4 54:17 requiring [1] 14:24 residents [2] 74:20,23 resolve [2] 11:11 101:19 respect [10] 75:5 97:4 102: 21 117:17 126:14 127:8,11, 23,25 128:2 Respectfully [1] 61:20 respectively [1] 87:18 respond [1] 73:4 Respondent [2] 123:24 124:6 Respondents [1] 124:9 response [6] 30:1 41:21 93:21 119:14 120:7,9 responses [4] 38:23 50:22</p>	<p>72:5 108:19 rest [1] 128:17 resting [1] 61:10 rests [1] 131:16 result [3] 8:15 100:15 127: 4 results [3] 9:1 42:4 85:2 retained [1] 25:8 retention [1] 26:2 retrying [1] 77:7 reversal [1] 101:10 reverse [4] 6:10 32:1 50:13 120:12 reversed [3] 8:10 27:21 32: 19 review [15] 6:14 32:5,6 42: 3 50:4,5 52:8 54:22 57:7 101:4 122:25 125:19 126: 1,6,18 reviewed [1] 32:18 reviewing [6] 33:2 34:6 61: 4 117:2 123:2,5 reviews [1] 103:24 rid [1] 26:24 Rights [5] 21:1 61:19 63: 20 68:22 69:2 ring [1] 95:6 rings [1] 79:17 rise [2] 20:4 21:4 risky [2] 63:9 91:20 rivers [2] 45:3 134:11 ROBERTS [56] 4:3 7:18 16: 7 31:18 32:4,22 33:1,20 36:18 37:18 40:17 43:18 46:10 48:15 55:25 59:17, 23 61:1 62:14,17 63:12,18, 22 64:3 68:22 71:4 77:25 78:2,5,10,25 79:10 80:15 81:3 82:1 88:19 90:21 94: 14 96:8 100:3,6 103:23 104:6,23 113:7 114:11,13 116:5 117:20 122:21 126: 10 131:5 135:17,25 136:11, 16 Roberts' [2] 35:15 94:22 robust [2] 28:9 99:19 role [1] 118:3 rubber-stamp [1] 34:3 Rucho [2] 114:18,24 rule [4] 38:9 56:8 109:14,25 run [1] 84:25 running [1] 67:15</p>	<p>satisfy [1] 112:13 saw [1] 88:16 saying [14] 11:25 12:10 14: 2,5 15:16 35:1 38:20 42:1 54:6 61:16 79:18 83:19 98: 9 103:11 says [19] 5:14,14 13:7 17:4, 5 21:13 22:12 41:6 53:5 54:11 55:10 65:14,16 74:2 76:5 79:17 107:10 108:13, 21 scenario [2] 13:22 51:16 scenarios [1] 110:11 scientists [2] 58:14 86:12 Scott [1] 77:24 screen [2] 20:10 68:6 scroll [1] 20:9 scrutiny [2] 113:15 114:3 se [1] 104:3 Sean [1] 84:21 Second [7] 5:8 50:12 80: 15 101:21 102:2 103:20 114:2 sections [1] 26:23 secure [2] 21:17 31:6 see [13] 13:23 20:11 23:9 43:23 59:7 66:10 73:7 99: 6,13 102:22 127:16 130:7, 16 seeing [3] 68:6,11 118:19 seek [1] 106:22 seeking [3] 15:10 82:23 94: 10 seem [3] 8:23 61:17 101:16 seems [5] 89:9 97:19 102: 15 106:21 124:15 seen [1] 105:8 selected [1] 38:15 SENATE [8] 1:5 30:4 55:3 62:2 69:13 70:4 135:1,11 Senator [16] 16:21 45:6,13, 18 55:1,3 62:21 70:25 82: 22 91:2 111:13 132:11 135:9,14,18,19 send [2] 101:16 103:17 sense [5] 5:10 11:8 51:19 121:17 130:3 sensitive [2] 16:17 100:18 sent [1] 134:16 sentence [3] 41:12 74:6 136:12 separate [1] 26:20 serious [1] 74:11 served [5] 72:20,21 84:11, 18 85:17 serves [1] 59:12 session [1] 65:3 set [8] 8:6 37:8,13 40:11 42: 9,12,14 99:20 setting [2] 54:25 117:16 settled [1] 101:11 seven [1] 37:15</p>
---	--	---	--	---

## Official - Subject to Final Review

<b>several</b> <sup>[1]</sup> 10:8 <b>shape</b> <sup>[2]</sup> 47:16 105:17 <b>shaped</b> <sup>[2]</sup> 104:10 105:1 <b>share</b> <sup>[2]</sup> 4:19 24:19 <b>Shaw</b> <sup>[4]</sup> 62:6 74:9 102:9 114:1 <b>Shelby</b> <sup>[1]</sup> 15:23 <b>shelve</b> <sup>[1]</sup> 85:2 <b>shifting</b> <sup>[2]</sup> 51:22 90:17 <b>shifty</b> <sup>[1]</sup> 82:2 <b>shoes</b> <sup>[1]</sup> 130:2 <b>short</b> <sup>[1]</sup> 55:8 <b>show</b> <sup>[19]</sup> 10:1 15:15 17:6 33:4 38:13 41:3,15,24 44:15 57:11 59:16 83:23 100:22 108:1 110:9,13 120:18 129:17,18 <b>showed</b> <sup>[12]</sup> 7:2 9:9 15:14 18:4,5 36:3 55:16 70:14 90:8,11 111:24 133:8 <b>showing</b> <sup>[5]</sup> 14:25 55:18 85:18 107:14 124:13 <b>shown</b> <sup>[2]</sup> 70:13 120:22 <b>shows</b> <sup>[3]</sup> 30:11 33:16 82:23 <b>side</b> <sup>[4]</sup> 60:4 93:16 119:13 132:16 <b>side's</b> <sup>[1]</sup> 119:9 <b>sides</b> <sup>[1]</sup> 109:15 <b>significant</b> <sup>[13]</sup> 7:5 36:6 42:4 44:6 45:3 62:7 73:13 74:8 77:15 83:24 91:13 92:12 100:23 <b>significantly</b> <sup>[1]</sup> 73:24 <b>similar</b> <sup>[2]</sup> 124:2 128:4 <b>similarly</b> <sup>[1]</sup> 41:11 <b>simple</b> <sup>[1]</sup> 133:14 <b>simplest</b> <sup>[2]</sup> 110:8 116:13 <b>simply</b> <sup>[10]</sup> 5:10 11:2 16:15, 20 34:3 58:23 84:17 100:15 101:18 102:8 <b>simulation</b> <sup>[4]</sup> 40:14 83:13, 15 84:25 <b>single</b> <sup>[5]</sup> 18:12,16,22 69:12 115:20 <b>sitting</b> <sup>[1]</sup> 18:18 <b>situation</b> <sup>[9]</sup> 13:20 14:4,12 32:2 52:5 59:20 98:13 125:19 128:15 <b>six</b> <sup>[1]</sup> 94:7 <b>size</b> <sup>[2]</sup> 7:20 76:18 <b>sizes</b> <sup>[1]</sup> 35:18 <b>skeptical</b> <sup>[1]</sup> 89:23 <b>smoking</b> <sup>[3]</sup> 14:12 15:19, 19 <b>software</b> <sup>[1]</sup> 20:8 <b>Solicitor</b> <sup>[1]</sup> 2:6 <b>someone</b> <sup>[1]</sup> 26:19 <b>sometimes</b> <sup>[2]</sup> 10:22 130:15 <b>somewhere</b> <sup>[1]</sup> 47:18 <b>sophisticated</b> <sup>[1]</sup> 64:9	<b>sorry</b> <sup>[14]</sup> 10:17 25:19 28:4 29:21 49:13 51:15 62:17 64:6 65:21 74:6 76:15 86:20 87:10 103:22 <b>sort</b> <sup>[15]</sup> 15:2 51:22 53:12 98:12 102:8 104:16 106:5 111:17 115:2,20 117:8 119:4 126:18 128:6 130:14 <b>sorted</b> <sup>[3]</sup> 56:17 60:19 83:4 <b>sorting</b> <sup>[4]</sup> 62:7 74:8 77:15 93:25 <b>sorts</b> <sup>[1]</sup> 60:8 <b>SOTOMAYOR</b> <sup>[33]</sup> 9:13 10:9,10,17,18 15:12 16:5 25:19,25 26:5,14,16 27:7 37:19,20 38:24 39:10,20 40:5 88:20,21 89:3,9,20 90:7,20 103:21 111:19 112:4,10,19,22 113:5 <b>Sotomayor's</b> <sup>[1]</sup> 40:19 <b>sound</b> <sup>[1]</sup> 87:15 <b>sounds</b> <sup>[3]</sup> 17:2 18:1 50:9 <b>SOUTH</b> <sup>[8]</sup> 1:5,9 4:5 20:23 78:1 80:3 115:25 133:20 <b>speaks</b> <sup>[1]</sup> 130:13 <b>special</b> <sup>[2]</sup> 11:3 100:17 <b>specific</b> <sup>[2]</sup> 103:7 127:13 <b>specifically</b> <sup>[1]</sup> 86:10 <b>specificity</b> <sup>[1]</sup> 79:11 <b>spit</b> <sup>[1]</sup> 109:3 <b>split</b> <sup>[8]</sup> 27:23 29:9 37:14 43:23,24 44:24 46:2 47:13 <b>spoke</b> <sup>[1]</sup> 126:2 <b>spoken</b> <sup>[1]</sup> 20:17 <b>sponsor</b> <sup>[3]</sup> 55:2 62:22 72:17 <b>sponsoring</b> <sup>[1]</sup> 132:12 <b>sponte</b> <sup>[1]</sup> 5:2 <b>square</b> <sup>[1]</sup> 132:20 <b>stable</b> <sup>[2]</sup> 18:15 20:5 <b>Staff</b> <sup>[7]</sup> 24:16,18 66:21 82:14 111:12 132:6,13 <b>stand</b> <sup>[4]</sup> 21:12 54:3,18 82:2 <b>standard</b> <sup>[38]</sup> 6:18 8:12 9:17 10:12 12:16 17:8 27:13 31:11 32:14 33:25,25 34:1, 2 38:18 39:5,11,14 50:11, 12 52:15 53:1 57:7 61:3 94:18,24 95:8 102:6,10,11, 19,20 103:1 114:7 116:16, 19 117:12,13 125:21 <b>standards</b> <sup>[5]</sup> 17:13 102:4 103:16 123:2 126:8 <b>standpoint</b> <sup>[1]</sup> 96:14 <b>stark</b> <sup>[1]</sup> 27:19 <b>start</b> <sup>[2]</sup> 10:19 107:1 <b>started</b> <sup>[1]</sup> 114:20 <b>starting</b> <sup>[1]</sup> 9:14 <b>STATE</b> <sup>[25]</sup> 1:9 4:5 8:22,22 9:6 14:5 20:16,17,23 41:	12 51:9 56:22 65:23 69:9 70:6 74:1 82:20 83:19 88:25 94:5 100:13 105:12 117:2,6 120:8 <b>state's</b> <sup>[3]</sup> 13:24 97:1 106:3 <b>state-wide</b> <sup>[1]</sup> 56:22 <b>stated</b> <sup>[1]</sup> 64:14 <b>statement</b> <sup>[2]</sup> 27:16 55:10 <b>statements</b> <sup>[1]</sup> 66:6 <b>STATES</b> <sup>[7]</sup> 1:1,19 2:8 3:10 61:15 100:8 132:5 <b>statistically</b> <sup>[3]</sup> 7:5 36:6 42:4 <b>statistics</b> <sup>[1]</sup> 75:15 <b>stay</b> <sup>[1]</sup> 88:1 <b>stayed</b> <sup>[3]</sup> 98:1 111:9 120:15 <b>stays</b> <sup>[2]</sup> 97:16 128:15 <b>steady</b> <sup>[1]</sup> 72:4 <b>stereotypes</b> <sup>[1]</sup> 57:20 <b>stereotyping</b> <sup>[1]</sup> 92:5 <b>still</b> <sup>[12]</sup> 12:20 21:4 90:3 92:12 93:7,7 94:17 98:16 105:15 109:8 126:6,7 <b>story</b> <sup>[1]</sup> 106:3 <b>straightforward</b> <sup>[1]</sup> 101:3 <b>strange</b> <sup>[1]</sup> 89:10 <b>strangely</b> <sup>[1]</sup> 61:7 <b>strength</b> <sup>[2]</sup> 103:8 119:23 <b>strict</b> <sup>[2]</sup> 113:15 114:3 <b>strikes</b> <sup>[1]</sup> 69:23 <b>strong</b> <sup>[5]</sup> 56:13 61:21,22 110:17 114:4 <b>stronger</b> <sup>[3]</sup> 7:3 36:3 91:4 <b>structure</b> <sup>[1]</sup> 9:23 <b>struggling</b> <sup>[2]</sup> 94:18 124:8 <b>study</b> <sup>[3]</sup> 8:14,17,25 <b>studying</b> <sup>[1]</sup> 121:22 <b>sua</b> <sup>[1]</sup> 5:2 <b>subject</b> <sup>[2]</sup> 17:8 101:4 <b>submit</b> <sup>[3]</sup> 11:7 64:23 85:25 <b>submitted</b> <sup>[3]</sup> 94:12 136:18,20 <b>subordinated</b> <sup>[2]</sup> 55:17 105:21 <b>subordination</b> <sup>[1]</sup> 80:20 <b>subsidiary</b> <sup>[4]</sup> 95:16,18,25 96:7 <b>substance</b> <sup>[1]</sup> 9:15 <b>substantial</b> <sup>[1]</sup> 93:7 <b>substantiate</b> <sup>[1]</sup> 86:15 <b>suburb</b> <sup>[1]</sup> 44:12 <b>subverted</b> <sup>[1]</sup> 6:12 <b>sufficient</b> <sup>[2]</sup> 32:10 109:24 <b>sufficiently</b> <sup>[2]</sup> 118:11 121:16 <b>suggest</b> <sup>[2]</sup> 37:25 115:8 <b>suggesting</b> <sup>[1]</sup> 60:3 <b>sum</b> <sup>[1]</sup> 123:15 <b>summarize</b> <sup>[2]</sup> 31:2 43:22	<b>supplemental</b> <sup>[1]</sup> 86:24 <b>support</b> <sup>[5]</sup> 19:6 23:19 83:22 118:13 134:20 <b>supported</b> <sup>[2]</sup> 104:7 106:3 <b>supporting</b> <sup>[3]</sup> 2:8 3:11 100:9 <b>supports</b> <sup>[2]</sup> 33:16 116:21 <b>suppose</b> <sup>[2]</sup> 75:10 120:3 <b>supposed</b> <sup>[3]</sup> 31:21 38:25 40:21 <b>SUPREME</b> <sup>[2]</sup> 1:1,18 <b>surely</b> <sup>[1]</sup> 18:7 <b>surprise</b> <sup>[2]</sup> 67:4,9 <b>surprising</b> <sup>[3]</sup> 68:14 71:13 72:1 <b>survived</b> <sup>[1]</sup> 72:16 <b>suspect</b> <sup>[3]</sup> 81:12 90:19 134:11 <b>suspicious</b> <sup>[1]</sup> 20:14 <b>switch</b> <sup>[2]</sup> 122:13,15 <hr/> <b>T</b> <hr/> <b>Tai</b> <sup>[1]</sup> 77:24 <b>takeaway</b> <sup>[1]</sup> 95:3 <b>talked</b> <sup>[3]</sup> 42:9 49:8 121:1 <b>talks</b> <sup>[1]</sup> 93:4 <b>target</b> <sup>[16]</sup> 5:3,8,11,13,22, 23 6:7 19:6 29:12 33:7 51:18 62:1 77:14 113:24 121:4 126:24 <b>targeted</b> <sup>[2]</sup> 73:14,24 <b>task</b> <sup>[1]</sup> 11:2 <b>tasked</b> <sup>[1]</sup> 85:10 <b>team</b> <sup>[1]</sup> 19:11 <b>technology</b> <sup>[1]</sup> 109:2 <b>tells</b> <sup>[1]</sup> 79:3 <b>term</b> <sup>[4]</sup> 8:7 71:18 106:25 121:15 <b>terms</b> <sup>[4]</sup> 16:9 35:21 36:7 52:23 <b>Terreni</b> <sup>[1]</sup> 66:21 <b>test</b> <sup>[5]</sup> 8:1 47:7,21 90:3 114:1 <b>tested</b> <sup>[3]</sup> 69:5 77:5 83:18 <b>testified</b> <sup>[8]</sup> 16:21 21:25 45:14 55:5 77:2 124:10,11 135:18 <b>testify</b> <sup>[1]</sup> 37:23 <b>testimony</b> <sup>[37]</sup> 9:7 10:3 16:15 30:3,10 35:15 39:23 43:1 50:7 52:11,17 53:17 55:1 57:4 58:11,11,12 59:12 66:20 77:8 79:17 80:8 81:17,17,19 83:17 84:7,10 85:23 86:5 94:22 95:4 96:20, 21 124:18 130:5,12 <b>text</b> <sup>[2]</sup> 55:5 135:21 <b>theme</b> <sup>[1]</sup> 119:9 <b>theoretically</b> <sup>[1]</sup> 125:8 <b>theory</b> <sup>[5]</sup> 5:3,9 8:20 19:7 51:18 <b>there's</b> <sup>[34]</sup> 7:13 12:4,5,6, 12 14:15 29:20,22 33:6,10,	11 38:9 45:24 51:19 53:17 55:18 61:2,6 68:24 85:12 92:18 101:5 108:11 109:24 119:19 120:17 121:4,5, 19 122:4 123:18 133:23,24 134:11 <b>therefore</b> <sup>[1]</sup> 32:19 <b>they've</b> <sup>[3]</sup> 26:25 74:3,7 <b>thinking</b> <sup>[1]</sup> 110:12 <b>thinks</b> <sup>[1]</sup> 89:11 <b>third</b> <sup>[1]</sup> 80:1 <b>THOMAS</b> <sup>[14]</sup> 1:3 6:14 33:22 58:1 78:6 101:13,24 102:5,14 103:11 113:9,10, 17 114:6 <b>Thomas's</b> <sup>[2]</sup> 10:5 17:9 <b>though</b> <sup>[6]</sup> 18:2 26:25 27:1 30:19 98:11 102:16 <b>thousands</b> <sup>[2]</sup> 24:2 109:4 <b>threatened</b> <sup>[1]</sup> 132:14 <b>three</b> <sup>[11]</sup> 6:21 7:10,14 38:6, 22,24 77:8 79:23 82:4 96:10,15 <b>three-judge</b> <sup>[3]</sup> 32:20 73:18 118:18 <b>throughout</b> <sup>[1]</sup> 67:14 <b>throw</b> <sup>[1]</sup> 105:3 <b>tick</b> <sup>[2]</sup> 10:7 28:13 <b>tilt</b> <sup>[7]</sup> 14:7 91:5 97:13 106:24 108:13 119:17 132:7 <b>today</b> <sup>[5]</sup> 106:9 115:17 118:7 134:22 135:24 <b>Today's</b> <sup>[1]</sup> 131:10 <b>together</b> <sup>[3]</sup> 27:17 36:14 130:24 <b>tons</b> <sup>[1]</sup> 70:7 <b>took</b> <sup>[3]</sup> 102:8 106:11 125:11 <b>tool</b> <sup>[1]</sup> 11:10 <b>tort</b> <sup>[1]</sup> 110:11 <b>total</b> <sup>[11]</sup> 34:22 35:16,19,22 49:7 57:10 70:20 77:3,13, 21 96:3 <b>totally</b> <sup>[2]</sup> 19:1 132:24 <b>touched</b> <sup>[1]</sup> 8:21 <b>tough</b> <sup>[1]</sup> 119:3 <b>traded</b> <sup>[1]</sup> 91:23 <b>tradeoffs</b> <sup>[1]</sup> 47:15 <b>traditional</b> <sup>[25]</sup> 4:16 7:23 9:11 23:6 36:10 43:7 44:22 47:8,22,25 55:16,23 65:5, 12,20 77:19 80:20 85:24 88:24 89:18 105:20 106:2 124:10 132:9 134:1 <b>transportation</b> <sup>[1]</sup> 45:4 <b>treat</b> <sup>[1]</sup> 83:2 <b>treated</b> <sup>[3]</sup> 41:16 91:22 92:4 <b>Trende</b> <sup>[4]</sup> 48:22,24 84:21, 21 <b>trial</b> <sup>[23]</sup> 11:3 16:15 20:7 21:25 23:9 30:11 35:13 43:6,
--	--	--	---	--

## Official - Subject to Final Review

<p>10 53:15 54:3 58:22 65:2, 13,14,22 66:22 72:19 78: 19 79:10 86:2 100:18 134: 4</p> <p><b>tried</b> [2] 33:4 70:24</p> <p><b>troubled</b> [1] 10:4</p> <p><b>true</b> [6] 20:23 21:20 22:20 25:14 78:11 90:4</p> <p><b>Trump</b> [17] 18:23 22:13,22 29:10 35:8 74:21,22 75:1, 15 76:10 97:4,6,7,12,18 98: 5 122:7</p> <p><b>Trust</b> [1] 71:2</p> <p><b>truth</b> [1] 110:19</p> <p><b>try</b> [3] 8:16 13:24 123:21</p> <p><b>trying</b> [15] 13:25 14:6 23:8 27:9 51:23 59:24 68:25 72: 10 97:13,15 123:7 124:6 125:23 129:12 130:9</p> <p><b>tuned</b> [1] 133:18</p> <p><b>turn</b> [5] 6:21 28:21 33:14 34:16 132:14</p> <p><b>turned</b> [1] 132:2</p> <p><b>turning</b> [1] 13:17</p> <p><b>turnout</b> [6] 5:14 22:3,9 29: 2,7 133:11</p> <p><b>turns</b> [2] 71:14 79:16</p> <p><b>Tuskegee</b> [1] 132:19</p> <p><b>two</b> [19] 22:10 26:23 38:6,8, 23 40:2,20 41:2 45:7 55: 14 72:5 74:18 75:4 78:15 87:20 111:5 125:11 131: 22 132:5</p> <p><b>type</b> [1] 86:1</p> <p><b>typically</b> [1] 104:2</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>ultimate</b> [2] 40:24,24</p> <p><b>ultimately</b> [6] 49:20 54:12 62:20 71:1 81:9 93:20</p> <p><b>unanimous</b> [1] 77:12</p> <p><b>unanimously</b> [1] 59:13</p> <p><b>uncommon</b> [1] 30:23</p> <p><b>uncorrected</b> [1] 5:25</p> <p><b>under</b> [16] 8:11 9:14,17 10: 11 39:13,13 42:3 46:8 57: 7 87:19,21 97:20 103:1 106:25 116:16 125:9</p> <p><b>undercut</b> [1] 48:25</p> <p><b>undermine</b> [2] 6:1 8:19</p> <p><b>underscored</b> [1] 132:22</p> <p><b>underscores</b> [2] 21:18 131:11</p> <p><b>understand</b> [16] 8:20 9:19 14:7 31:20 34:25 46:14,20 51:21 61:1 63:19 67:22 92: 8 95:7 97:16 114:19 129: 13</p> <p><b>understanding</b> [11] 10:2 24:1 48:23 91:1,2,10 96:2 109:19 121:23 124:17 128: 5</p> <p><b>understood</b> [8] 46:18 50:</p>	<p>10 52:14 88:21,22 89:10 94:24 98:2</p> <p><b>uniquely</b> [2] 43:5,9</p> <p><b>UNITED</b> [6] 1:1,19 2:8 3:10 100:8 132:5</p> <p><b>unjustified</b> [1] 101:7</p> <p><b>unlawful</b> [2] 98:10 114:23</p> <p><b>unless</b> [1] 97:16</p> <p><b>unprobative</b> [1] 7:12</p> <p><b>unrebutted</b> [13] 19:10 30: 11 57:4 58:10,24 59:11 73: 21 74:1 76:21 77:16 84:10 96:25 111:6</p> <p><b>unreliable</b> [6] 7:11 19:9,10 42:25 69:14 133:4</p> <p><b>until</b> [5] 65:2,13,18,22 67: 11</p> <p><b>unusual</b> [1] 111:22</p> <p><b>up</b> [21] 9:13 21:12 38:21 46: 8 47:16 54:8 64:12 76:3 89:24 90:14 96:24 104:18, 24,25 110:19 117:22 119:7 123:19 127:21 128:12 136: 10</p> <p><b>useful</b> [1] 83:21</p> <p><b>using</b> [21] 5:21 9:11 14:20 29:12 48:5 55:11 57:2,18 63:15 69:24 71:16,23 77: 22 81:11 83:19 84:25 99: 23 105:13 112:6,14 115:3</p> <p><b>usual</b> [2] 103:15 126:7</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>validate</b> [1] 58:15</p> <p><b>validity</b> [1] 86:4</p> <p><b>various</b> [1] 62:2</p> <p><b>varying</b> [1] 25:4</p> <p><b>vast</b> [1] 29:13</p> <p><b>Vera</b> [1] 112:18</p> <p><b>version</b> [1] 16:13</p> <p><b>versus</b> [6] 4:5 16:3 73:16 97:5,6 105:11</p> <p><b>view</b> [8] 13:25 18:2 31:4,5 55:9 106:6 118:1 124:19</p> <p><b>violation</b> [2] 129:5,11</p> <p><b>virtually</b> [1] 12:25</p> <p><b>vital</b> [1] 131:12</p> <p><b>volume</b> [3] 104:11,11 105: 2</p> <p><b>volumes</b> [1] 16:2</p> <p><b>vote</b> [15] 4:19 24:19 28:21 35:8,8 42:19 101:14,15 102:11,15,18 103:6 104:2 122:8,13</p> <p><b>voted</b> [1] 135:15</p> <p><b>voter</b> [10] 5:14 24:5,5 36:11 98:5 106:13,13 122:7,7 133:17</p> <p><b>voters</b> [49] 5:16 7:17 8:8 26:12 29:7,9,14 46:25 60: 20 62:7,8 63:25 73:15,20, 23 76:20,20 77:18 83:4 87: 1 88:17 91:23 97:5,6,6,7,8,</p>	<p>12,18,21 98:3,4,14,15,20, 20,22 100:24 105:6 121:6, 6,7 122:11,12 124:22 128: 10,19 129:3 133:10</p> <p><b>votes</b> [12] 29:18 30:15 35:5 74:21,22,25 76:7,11,13,25 77:1 133:16</p> <p><b>voting</b> [27] 18:12,21,24 19: 22,23 20:25 22:3 29:3,6 46:6 57:18 61:19 62:18 63: 20 68:22 69:1 75:21 93:19 99:7 103:8,24 115:22,24 121:24 122:1 133:11 135: 6</p> <p><b>Voting-Age</b> [1] 56:20</p> <p><b>VRA</b> [3] 13:25 104:16 113: 15</p> <p><b>VT</b> [1] 36:13</p> <p><b>VTD</b> [15] 7:3,15 21:21 34: 23 35:1,18 36:11 37:8,10 42:9,12,14 47:14 48:7 88: 15</p> <p><b>VTDs</b> [20] 7:6 8:8 9:8 21:22, 24 35:18 36:4,7,14 37:14 38:13 44:24 47:17 51:7 59: 4 71:6 79:11 83:3 84:14 106:13</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>walk</b> [2] 58:20 128:13</p> <p><b>walking</b> [1] 128:14</p> <p><b>wanted</b> [11] 45:23 46:3 53: 13 63:25 72:17 91:3,4,5 110:14 116:13 126:12</p> <p><b>wanting</b> [1] 50:4</p> <p><b>wants</b> [2] 45:20 75:2</p> <p><b>Washington</b> [5] 1:14 2:2,7 45:10,25</p> <p><b>water</b> [2] 134:8,10</p> <p><b>way</b> [31] 8:19 12:14,17 13:1, 9 29:15 30:7 33:8 40:24 41:16 43:24 79:18 83:7 87: 5 88:22 90:10 96:18 98:17 107:15 108:9,14 109:8 110:10 112:12 123:16 129: 1,15,17,21 130:5 132:21</p> <p><b>ways</b> [3] 109:2 110:14 129: 19</p> <p><b>weak</b> [2] 133:23 134:19</p> <p><b>wealth</b> [1] 60:2</p> <p><b>Wednesday</b> [1] 1:15</p> <p><b>weigh</b> [3] 16:23 17:17 32: 24</p> <p><b>weight</b> [1] 84:2</p> <p><b>welcome</b> [3] 6:13 57:25 101:12</p> <p><b>West</b> [11] 44:8,12 73:1,2,3, 5 83:2,6 92:8,25 135:15</p> <p><b>whatever</b> [6] 7:25 16:8 108:8 112:13,25 121:15</p> <p><b>whatsoever</b> [1] 5:15</p> <p><b>whereas</b> [1] 41:9</p> <p><b>Whereupon</b> [1] 136:19</p>	<p><b>whether</b> [38] 7:3,6 8:2 13: 17 19:14 26:18 27:12 30:8 35:1 36:4 47:21 50:24 59: 4 60:17 61:8 62:6 64:5 67: 18,19 82:7 90:4 95:1,2 103:9 110:6,17 111:15 114:3 116:21,23 119:5 122:8 123:10 126:15 127: 19,24 129:18 136:2</p> <p><b>white</b> [37] 5:16 26:19 29:7, 9,11 38:15 41:5,8,15 44:14 59:9 72:23 73:10,11,15,16, 19 76:20 77:9 84:15,15 87: 5 91:23,25 92:9,24 93:5 95:12 97:21 98:14,20 121: 6,7 122:12 128:10 129:3 133:10</p> <p><b>white-on</b> [1] 87:4</p> <p><b>whites</b> [5] 26:6,24 90:12, 14 92:19</p> <p><b>whole</b> [11] 38:4 46:16 53:7 65:7,8,10 91:4 112:10 116: 21 120:4 136:9</p> <p><b>wholly</b> [2] 88:13 106:3</p> <p><b>will</b> [7] 4:3 6:1,19 106:5,23 111:7 125:6</p> <p><b>win</b> [1] 84:22</p> <p><b>within</b> [2] 8:8 88:10</p> <p><b>without</b> [12] 5:21 11:3 59: 24 65:23 91:12 107:13 108:9,9 112:6 130:17,25 131:1</p> <p><b>witness</b> [3] 54:2,11,18</p> <p><b>witnesses</b> [2] 95:13 118: 20</p> <p><b>wonder</b> [1] 13:18</p> <p><b>wondering</b> [6] 32:8 38:17 53:21 102:20 107:24 127: 24</p> <p><b>words</b> [2] 40:22 127:2</p> <p><b>work</b> [4] 52:14 86:12 104:1 117:9</p> <p><b>worked</b> [2] 72:11,12</p> <p><b>working</b> [1] 78:12</p> <p><b>works</b> [1] 126:4</p> <p><b>world</b> [4] 108:2,6 129:6 130:23</p> <p><b>worry</b> [1] 37:24</p> <p><b>worse</b> [1] 87:3</p> <p><b>worth</b> [1] 30:24</p> <p><b>worthless</b> [1] 42:15</p> <p><b>wracked</b> [1] 60:11</p> <p><b>wrap</b> [1] 54:19</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>year</b> [13] 18:12,17,22 22:9 23:15 30:18,20,21,25 61: 14 79:10 133:13,15</p> <p><b>year's</b> [1] 30:24</p> <p><b>York</b> [2] 2:4,4</p> <p><b>yourself</b> [1] 112:13</p>
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